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Labor Law Tools to Remedy Alien Employment Discrimination

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Of the substantial burdens confronting aliens upon arrival in the United States, securing steady employment is perhaps the most crucial. Often, the aspiration of aliens to take up residence in this country compels them to become financially self-sufficient within a very short period of time, for as the Supreme Court observed in *Truax v. Raich*,¹ "in ordinary cases they cannot live where they cannot work."² Yet aliens have never received equal treatment in the job market.³ Subjected to situations reminiscent of the historical discrimination against certain groups of immigrants, aliens are often categorized, stigmatized, and seldom permitted an equal opportunity to exhibit work-related skills which may demonstrate abilities consonant with objectively determined employment qualifications. Employed aliens as well as those seeking employment know that, in reality, objectively determined job qualifications rarely exist. Not infrequently, work assignments, wage rates, seniority lists and advancement opportunities are determined with an eye toward the alien's lack of citizenship.⁴ Further, very little time is consumed

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1. 239 U.S. 33 (1915).
2. *Id.* at 42. While nullifying an Arizona law which prohibited employers from hiring aliens to comprise more than 20 percent of their work force because of its repugnance to the fourteenth amendment, the Court in *Truax* further noted that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of . . . personal freedom and opportunity . . . ." *Id.* at 41.
4. *See* Packinghouse Int'l Union v. NLRB, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969). The court, in concluding that the employer's policy and practice constituted invidious discrimination on the basis of race and alienage, quoted approvingly from the trial examiner's opinion: "It is clear on this record, and I conclude, that the only reason Respondent [employer] paid Ruiz $1.50 an hour for seven months while was [sic] doing a $1.80 job which five or six Anglos were concurrently paid $1.80 for performing, was because Respondent considered Ruiz and other minority employees as docile, cheap, labor, and in order to keep them in this condition of servitude." *Id.* at 1138.
before a newly employed alien discovers that the employer is not alone at fault or perhaps even primarily to blame for discriminatory conditions. For it is often the certified bargaining representative, usually a union, the historical champion of workers’ rights, which complacently ignores or even promotes the employer’s discriminatory treatment of alien employees or job applicants by negotiating discriminatory contract provisions or by unreasonably refusing to prosecute alien employee complaints through grievance machinery fabricated by the collective bargaining agreement. But such mistreatment, whether initiated by the employer or the union or both at once, need not go uncorrected, as alien employees and applicants for employment may utilize various effective legal channels to combat employment discrimination.

Recently, however, the Supreme Court deprived aliens of the sanctuary of one of the legislative schemes most frequently used by minority groups to remedy employment discrimination. In Espinoza v. Farah Manufacturing Co., the Court declared that an employer’s decision not to employ a person because he or she is not a United States citizen does not constitute employment discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964. Aliens, no longer within the guardianship of Title VII, are therefore more easily susceptible to discriminatory treatment by unions and employers.

The purpose of this article is to examine the National Labor Relations Act [NLRA] as a fertile source of potential relief for alien employment dis-
Alien Employment Discrimination. The discussion will focus primarily on the pronouncements and decisions of the National Labor Relations Board whose function as a guarantor of equal employment opportunity has yet to be fully explored. Initially, examination of the NLRA as it reflects national labor policy through the inauguration of the collective bargaining process as well as the Board's responsibility to supervise union and employee conduct in connection with collective bargaining is called for. While exploring the duty of unions to represent individual employees fairly—a duty which has traditionally been enforced by the courts and, to a lesser extent, the Board in specialized circumstances—this article will concentrate primarily upon Board procedures for alleviating employment discrimination. These procedures subdivide naturally into a cluster of remedial devices which spring from the Board's role as overseer of representation elections and from the Board's authority to penalize unions and employers who engage in egregious discriminatory conduct constituting unfair labor practices which violate section 8 of the Act.10

I. MINORITY PROTECTIONS EMBEDDED IN THE CONCEPTS OF MAJORITY RULE AND THE DUTY OF FAIR REPRESENTATION

The NLRA was originally conceived to encourage "the practice and procedure of collective bargaining and [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."11 It was Congress' belief that industrial peace and consequent productivity could be achieved and maintained only by statutorily promoting a roughly equivalent power allocation between labor and management through the vehicle of collective bargaining.12 This congressional rationale, sanctioning a clash of "equals" in the collective bargaining arena, was reinforced by judicial acceptance in NLRB v. Jones & Laughlin Steel Corp.13 While certifying the constitutionality of the NLRA in Jones & Laughlin, the Supreme Court reiterated its view of the need for labor organizations:

[T]hey were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of

10. Id. § 158.
11. Id. § 151.
himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers an opportunity to deal on an equality [sic] with their employer.  

To further assure that labor organizations could realistically achieve a position of bargaining power equal to that of the employer, Congress included section 9(a) in the NLRA which provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .

Section 9(a) is vital to the congressional scheme of collective bargaining. It sanctions the concept of majority rule of workers within appropriate bargaining units to create a superimposed dimension of unity. It then invests the bargaining representative of this "unified" group of workers with the sovereign power to act as an exclusive bargaining agent for the members of the designated bargaining unit. Although an employee may not want to be represented by the majority union, following the recognition of the union by the employer or its certification by the National Labor Relations Board he or she no longer has the power to negotiate an individual employment contract with the employer. Even though an individual employee may be able to successfully negotiate a more favorable contract, his or her wages, hours, work assignments, and other vital conditions of employment are determined by an agreement concluded by the employer and a union against which the employee may have voted. Similarly, as long as a bargaining representa-

14. Id. at 33, relying on American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921).
16. See J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). The Board labeled the refusal of management in J.I. Case to negotiate with the certified bargaining representative on matters which were covered in individual contracts an unfair labor practice under section 8(a) of the NLRA. The Supreme Court enforced the Board's decision. Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.
17. Advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and
tive has been voluntarily recognized by the employer or certified by Board action, the employer may not seek to negotiate individual contracts directly with the employees—even with a mathematical majority of them.¹⁸ National labor policy was constructed on the premise that employees will secure the most advantageous means of bargaining for improvements in the terms and conditions of their employment by consolidating their economic strength and acting through a bargaining representative freely chosen by a majority of the employees. This policy therefore extinguishes the individual employee's capacity to determine his or her individual relations with the employer and authorizes the certified bargaining representative to act in the interest of all employees. The bargaining representative alone is empowered to negotiate with the employer to establish terms and conditions of employment. During this process, the union may decide to press certain issues while deferring or trading off others for employer concessions. The individual employee may dispute these union decisions but he is bound by them.¹⁹

Like all newly hired employees, aliens hired by an employer whose work force is represented by a recognized or certified bargaining agent become susceptible to the arithmocracy of the current majority of union members, whether or not they become active union members. Unless the alien employees' interests conform precisely with the concerns of the union's majority, their interests in union or employer conduct relative to the terms and conditions of their employment may quietly be smothered to protect the collective interests of the membership majority. Therefore, alien employees are often in an unfortunately vulnerable position because they are forced to deal with two powerful hierarchies, which are themselves mutual adversaries, neither of which can be fully trusted to promote alien interests. It is not surprising, then, that alien employee grievances or proposed contract provisions favorable to aliens may be ignored in disputes over majority sanctioned demands or traded off as bargaining chips for an employer's offer which is more attractive to the union leadership.²⁰

choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.

³²¹ U.S. at 338-39.


²⁰. See Longshoremen's Local 13 v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), cert. denied, 404 U.S. 1016 (1972) (union violated its duty of fair repre-
employment discrimination in hiring\textsuperscript{21} or on the job which results from action or inaction by the employer or union, separately or in collusion, may look to the NLRA as the source of effective antidotes for employment discrimination.

If it is to survive constitutional attack, the imposing power of exclusive representation granted labor organizations in the NLRA to augment the functioning of the collective bargaining process must be tempered by fairness to individual employees. The necessary restraint upon union power is implemented by the duty of fair representation.\textsuperscript{22} The duty of labor organizations to represent individual employees fairly, which is implicit in the exclusive representation language of section 9(a) of the NLRA, comprises a fundamental component of the right of employees to bargain collectively through representatives of their own choosing.\textsuperscript{23} Aliens, victimized by employment

\textsuperscript{21} Rights conferred upon active employees by the Act are customarily extended to applicants for employment. See NLRB v. Houston Maritime Ass'n, 337 F.2d 333 (5th Cir. 1964) (right to be referred to available positions by union hiring hall without paying a percentage of wages for this service which union employees received without charge); NLRB v. Stratford Furniture Corp., 202 F.2d 884 (5th Cir. 1953) (right to engage in union organizational activities); John Hancock Mutual Life Ins. Co. v. NLRB, 191 F.2d 483 (D.C. Cir. 1951) (right not to be refused employment where applicant testified at certification hearing of union which he helped to organize and later filed unfair labor practice charges against employer).


\textsuperscript{23} See 29 U.S.C. § 157 (1970). The proviso to section 9(a) authorizes employees to present their own grievances to the employer without first going through union channels. It merely gives the employees the privilege of presenting grievances to the employer without placing any statutory obligation upon the employer to resolve the complaint. Frequently, while endeavoring to adjust the employees' grievances, the employer will be compelled to analyze important contract provisions. The employer's conclusions, drawn from this analysis, will not only govern the resolution of the complaint, but will also constitute an implicit unilateral interpretation of the contract provisions which, though favorable to the individual grievant, may nevertheless be inimical to the comprehensive interests of the majority of union members. Largely because such conduct could easily create severe animosity between unions and employers, the courts have prudently avoided relying on the section 9(a) proviso. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965); Wimberly v. Clark Controller Co., 364 F.2d 225, 228 (6th Cir. 1966); Broniman v. Great Atl. & Pac. Tea Co., 353 F.2d 559, 562 (6th Cir. 1965); Belk v. Allied Aviation Serv. Co., 315 F.2d 513, 517 (2d Cir. 1963); Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179, 185-86 (2d Cir. 1962).

Professor Cox concurs in the courts' circumscribed view of the section 9(a) proviso:
discrimination facilitated by the union, may file charges against the union for violating the duty of fair representation by its improper action or inaction.

The duty of fair representation requires rational union conduct without encouraging unnecessary interference with the union's vital representative function. This notion was initially articulated by the Supreme Court in Steele v. Louisville & Nashville Railroad\(^{24}\) where the Court declared that invidious employment discrimination based on race is an irremissible breach of the duty of fair representation. Although the majority of the bargaining unit employees is legislatively authorized to elect the bargaining representative, the Court admonished that the bargaining agent, once chosen, has a consequent legislative duty to exercise its power fairly on behalf of all members of the bargaining unit. More specifically, the Court directed the unions to consider requests of nonunion members and to express minority views to the employer during collective bargaining, as well as to protect fully the interests of the minority in their chosen occupation.\(^{25}\) The duty of fair representation therefore compels the union “to represent nonunion or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith.”\(^{26}\) However, the duty of fair representation is not violated by purely incidental unequal treatment. Unions and employers may have a legitimate rationale for differentiating among individual employees where variations in skill, experience, job difficulty, and similar factors exist.\(^{27}\) For this reason a union may be justified in either refusing, or acquiescing in, the employer's refusal to assign non-English-speaking but otherwise fully qualified aliens to positions in which they must deal with the general public on a daily basis. The Supreme Court alluded to the flexibility of the standard of review to be applied to union conduct in Ford Motor Co. v. Huffman: “A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.”\(^{28}\)

\(^{24}\) 323 U.S. 192 (1944).

\(^{25}\) 323 U.S. at 201-04. Just as collective bargaining is a continuing process, the union's duty of fair representation extends over the life of the contract to the day to day administration and adjustment of the contract and other work rules, the resolution of new problems not covered by the current contract, and the proper use of grievance procedures to protect employees' rights secured by the contract. See Conley v. Gibson, 355 U.S. 41, 46 (1957).

\(^{26}\) 323 U.S. at 204.

\(^{27}\) See id. at 203.

\(^{28}\) 345 U.S. 330, 338 (1953).
While it is commonly accepted that unions may not act unfavorably toward an individual employee or group of employees with positive bad motives such as those reflected in racial discrimination,\(^{29}\) personal hostility,\(^{30}\) or discrimination against nonmembers,\(^{31}\) a standard against which to measure less pernicious conduct is not so clearly discernible. Aliens, for example, are subject to subtle forms of employment discrimination such as unenthusiastic prosecution of alien employees' grievances. If one analyzes such union conduct merely for the presence of a fatal bad move, it may well fall within the "wide range of reasonableness"; although the union's decision not to take the grievance to arbitration may be unjustified, objective bad faith under these circumstances may be impossible to prove. The Supreme Court in *Humphrey v. Moore\(^{32}\) began to explore the idea of expanding the duty of fair representation to include affirmative union responsibilities. Although the Court observed in *Humphrey* that the union had made its decision to dovetail the seniority lists of two merging trucking companies honestly and in good faith, the Court rested its approval of the union action equally upon its finding that "the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors."\(^{33}\)

The Court's conclusion in *Humphrey*, that unions must avoid arbitrary conduct toward individual employees, was further amplified by its decision in *Vaca v. Sipes*.\(^{34}\) The *Vaca* Court insisted that the "statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."\(^{35}\) The Court, while demonstrating its continued allegiance to the *Steele* prohibition of hostile discrimination and the good faith requirement of *Huffman*, explicitly added a third distinct obligation to refrain from arbitrary conduct. *Vaca* makes it clear that a demonstrable bad motive is no longer the only avenue available for proving that the union has

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30. See *Longshoremen's Local 13 v. Pacific Maritime Ass'n*, 441 F.2d 1061 (9th Cir. 1971); *Cunningham v. Erie R.R.*, 266 F.2d 411 (2d Cir. 1959).
31. Unions breach the duty of fair representation by favoring union members over nonmembers in contract bargaining or processing grievances. See *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Steele v. Louisville & N.R.R.*, 313 U.S. 192 (1944); *NLRB v. Longshoremen's Local 1581*, 489 F.2d 635 (5th Cir. 1974); *NLRB v. Operating Eng'rs Local 12*, 413 F.2d 705 (9th Cir. 1969); *NLRB v. Plumbers Local 38*, 388 F.2d 679 (9th Cir. 1968); *Steelworkers Local 937*, 200 N.L.R.B. 40 (1972); *Port Drum Co.*, 170 N.L.R.B. 555 (1968).
32. 375 U.S. 335 (1964).
33. *Id.* at 350.
34. 386 U.S. 171 (1967).
35. *Id.* at 177.
breached its duty of fair representation. The union may also fail to meet its obligation to individual employees by acting unfavorably towards them without reason or with merely a frivolous reason or by arbitrarily ignoring a meritorious grievance or processing it in a perfunctory manner. Although individual employees do not have an absolute right to have their complaints taken to arbitration, the union, if it declines to process the grievance, must have a legitimate reason grounded in a conscientious review of the merits of each grievance. But if the union processes individual employee complaints in an equitable fashion, the Court provides it with a measure of protection by prohibiting a trial court from declaring a breach of the duty based merely upon its own opinion that the underlying grievance was meritorious.

Presumably the Court in Vaca was directing trial courts to focus their attention solely upon the reasonableness of the method employed by the union in deciding whether to take an employee grievance to arbitration, rather than upon the allegations of the underlying complaint itself. This notion has been borne out by several recent circuit court decisions. The United States Court of Appeals for the First Circuit in De Arroyo v. Sindicato De Trabajadores Packinghouse concluded that the union's decision not to take several seniority grievances to arbitration because of its assumption that the grievances would be settled by a previously filed unfair labor practice complaint was not evidence of subjective bad faith. Nevertheless, the court held that the union's failure to investigate or make any informed judgment concerning the merits of the grievance demonstrated an arbitrary and perfunctory handling of the complaints in a manner inconsistent with the union's fair representation obligations recognized in Vaca.

36. See id. at 191. In one of the most recent preemption cases, Amalgamated Ass'n of Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), the Court unfortunately muddled the effort of Vaca to propound workable standards to be employed in measuring union conduct toward individual employees. There the Court, while discussing the applicability of the preemption doctrine to fair representation cases, stated that any attempt to demonstrate that a union has breached its duty of fair representation "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Id. at 301. Certainly the application of such a standard to fair representation cases would nullify the Vaca Court's caveat requiring unions to avoid arbitrary conduct whenever the interests of individual employees are involved. However, it is unlikely that the Court intended to obliterate the Vaca standards or restructure the rationale of the Huffman and Humphrey decisions. The central issue in the case was preemption, making the statement about the duty of fair representation dictum, and neither the dissent of Justice Douglas nor that of Justice White, who wrote the majority opinion in Vaca, intimates that the Lockridge decision in any way disfigures the Vaca standards.

37. See 386 U.S. at 194.
38. See id. at 192-93.
39. 425 F.2d 281 (1st Cir. 1970).
40. Id. at 284. Two years later the First Circuit affirmed a district court opinion
Similarly, in Griffin v. UAW, a Fourth Circuit panel reviewed a jury award accorded an employee who had been discharged for fighting with his supervisor at a hockey game. Judge Sobeloff observed that the union’s insistence on filing the discharge grievance with the same supervisor with whom the employee had fought was unjustified. Such a method of processing the grievance was held to be “the equivalent of arbitrarily ignoring the grievance or handling it in a perfunctory manner.” The court further stated:

Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority.

Finally, in Retana v. Elevator Operators Local 14, a Spanish-speaking employee appealed the trial court’s dismissal of her wrongful discharge action in which she alleged that the union had violated its duty of fair representation by (1) failing to provide a bilingual liaison between the union and its Spanish-speaking members, (2) failing to provide them with a copy of the collective bargaining agreement in Spanish, (3) neglecting to inform Spanish-speaking members of their right to have the union process a grievance in their behalf and (4) declining to promote the establishment of a bilingual supervisory system. The Ninth Circuit reinstated the employee’s claim, observing that the union could well have defaulted on its duty to fairly represent the Spanish-speaking employees by depriving them “of an opportunity to partic-
ipate either in the negotiation of a collective bargaining contract or in the enjoyment of its benefits by a language barrier which union officials exploited, or took no steps to overcome.\textsuperscript{45}

Whenever a union takes action as an exclusive bargaining agent, whether in its role as contract negotiator or administrator, it must do so reasonably and in good faith. If its decision is grounded in rational considerations, incidental discrimination will be tolerated to promote the general interests of the bargaining unit.\textsuperscript{48} If it conducts a thorough investigation in good faith before deciding not to process an employee grievance, it will not be held liable even if a court later rules that the grievance was meritorious.\textsuperscript{47} But whenever a union participates in classifying a group such as aliens for disparate treatment or refuses to process their meritorious grievances, the union's rationale for taking such action must be carefully examined. If the union conduct has no empirical justification or if it is perfunctory or arbitrary in nature, the union has failed to fairly represent the alien employees even though its action was beneficial to the majority of employees. Similarly, if the union's rationale is frivolous, it will not support unequal treatment and may have been constructed simply to conceal impermissible motives such as personal hostility. The duty of fair representation is designed to protect minority employee groups from subtle as well as hostile employment discrimination, and proof of a breach of this duty creates a claim through which alien employees may either seek judicial relief or petition the Board to invoke any of the several remedial measures made available to it by the Act.\textsuperscript{48}

\textsuperscript{45} Id. at 1024. A Second Circuit panel recently found that a union had exploited a complex reclassification scheme to deprive bargaining unit members of their rightful seniority positions. While not directing the union to dovetail seniority lists whenever two groups of employees are consolidated, the court declared that, in determining seniority among the bargaining unit employees, unions must not only refrain from bad faith conduct but must also implement their duty of fair representation by providing sufficient safeguards for the rights of minority unit members. Jones v. Trans World Airlines, Inc., 495 F.2d 790, 793 (2d Cir. 1974).

\textsuperscript{46} Proof that a union acted negligently in processing or dismissing an employee's grievance has been considered insufficient to support a violation of the duty of fair representation. See Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970), cert. denied, 402 U.S. 952 (1971); Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970); Simberlund v. Long Island R.R., 421 F.2d 1219 (2d Cir. 1970).


\textsuperscript{48} Of course, jurisdictional issues in duty of fair representation cases require an extensive analysis of the Supreme Court's preemption doctrine including a thorough examination of the Court's puzzling discussion of preemption theory as applied to fair representation cases in Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971), which is not within the scope of this Comment. For an extensive analysis, see Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, 51 Tex. L. Rev. 1037 (1973).
II. REMEDIAL MEASURES WITHIN THE DOMAIN OF THE BOARD

A. The Authority to Superintend the Election and Certification of Exclusive Bargaining Representatives

In addition to promulgating the concept of exclusive representation and the coordinate responsibility of fair representation, section 9 of the NLRA\textsuperscript{49} authorizes the Board to conduct and supervise representative elections and to determine whether or not to certify a successful union as the exclusive representative of an appropriate bargaining unit.\textsuperscript{50} If after the election results are certified, the employer refuses to recognize or bargain with the Board's endorsed representative, the Board is empowered to issue an order compelling the employer to bargain with the newly certified union in accordance with the provisions of section 9(a).\textsuperscript{51} Most unions, especially in their nascent stages, rely substantially upon this watchdog role which the Board assumes in conducting representative elections and in assuring the unions' functional existence as exclusive bargaining representatives. Such union reliance upon the plenary authority of the Board augments the Board's arsenal of alien employment discrimination remedies.\textsuperscript{52}

\begin{footnotesize}
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\item Section 9 directs that the representative chosen by a majority of employees in an appropriate bargaining unit shall be the exclusive bargaining representative of those employees. This section also establishes procedures for determining appropriate bargaining units and conducting representation elections.
\item The Board's responsibility under section 9(b) is to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subsection, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof." Over the years the Board has formulated several criteria which it applies to determine all questions concerning the appropriate bargaining unit. The foremost of the established considerations is the rule that "employees with similar interests shall be placed in the same bargaining unit." Chrysler Corp., 76 N.L.R.B. 55 (1948). In addition to the mutuality of interest, the Board gives great weight to the history of collective bargaining in the particular plant or industry involved in resolving issues of geographic scope, the general character of the proper bargaining unit, or the occupational categories of employees to be included in the unit. 13 NLRB Ann. Rep. 35-36 (1948).
\item Following certification by the Board, if the employer rejects the union's demand to bargain over a collective agreement, the union may file an unfair labor practice charge with the Board under section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1970). The Board, upon finding the charge to be meritorious, may then issue an affirmative order for the employer to bargain. However, if the employer wishes to challenge the certification by appealing the Board's decision to the courts, and if the objections are "fairly debatable" rather than frivolous and were not made in bad faith, the bargaining order will not become final until all opportunities for judicial review have been exhausted. See Steel-Fab, Inc., 212 N.L.R.B. No. 25, 86 L.R.R.M. 1474 (1974); Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), enforced, 449 F.2d 1058 (D.C. Cir. 1971).
\item When a union, lacking sufficient strength to deal profitably with the employer, relies on the Board to force the employer to the bargaining table, the Board has the
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If aliens are to receive even the most rudimentary protection, supervision of union and employer conduct must begin during the election period prior to Board certification. Customarily the Board requires that elections be held only in an atmosphere in which all employees are free from restraint, coercion and undue influence from either the employer or the union. 53 “In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.” 54 Unlike the adjudication of an unfair labor practice charge, assigning responsibility for the disruption of an election is not an issue when the Board rules on challenges to the validity of an election. “When, in the rare extreme case, the standard drops too low, because of [the Board’s] fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.” 55 The standard need not descend to the level at which it could constitute an unfair labor practice. Conduct much less severe than the equivalent of an unfair labor practice will destroy the “laboratory conditions” and will prevent the employees from making an absolutely free choice. 56

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53. See NLRB v. Tennessee Packers, Inc., Frosty Morn Div., 379 F.2d 172, 180 (6th Cir. 1967). (Board order enforced which set aside an election because the employer, in establishing new work rules immediately prior to the election, conferred benefits on some employees which interfered with their free choice). See also Amalgamated Clothing Workers v. NLRB, 424 F.2d 818 (D.C. Cir. 1970); NLRB v. Blades Mfg. Corp., 344 F.2d 998 (8th Cir. 1965); NLRB v. Houston Chronicle Publishing Co., 300 F.2d 273 (5th Cir. 1962) (discussing various types of pre-election conduct which are directly coercive or could reasonably be so construed by employees).


Our function, as we see it, is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.


Appeals to racial prejudice were vigorously condemned by the Board in Sewell Manufacturing Co. as injecting an irrelevant component into the election atmosphere which was highly destructive of the purpose of an election. The Board declared that appeals to racial prejudice on matters unrelated to the election create intolerable conditions which make rational, well informed exercise of the election franchise impossible. However, the Board refrained from censuring all references to race by sanctioning each participant's truthful representations of the opponent's position on racial issues which did not "deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals." The Board is attentive to election challenges alleging appeals to racial considerations and will carefully scrutin-

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Conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election. This is so because the test of conduct which may interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8 (a)(1).

Id. at 1786-87. Additionally, section 8(c) of the NLRA, 29 U.S.C. § 158(c) (1970), generally known as the "employer's free speech" provision, has been thought to protect employer's electioneering statements. See NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753 (9th Cir. 1967). However, in NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968), a First Circuit panel declared that although a series of election statements were themselves not illegal per se, when viewed in the totality of the circumstances of a pending election their coercive nature "interfered with the employees' exercise of a free and untrammeled choice in the election." Id. at 161. The Sinclair approach was affirmed by the Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), where the Court established guidelines for pre-election employee speeches. The Court in Gissel observed that any assessment of the precise scope of employer expression must be made in the context of the specific setting in which it occurs so as to balance the employer's free speech rights with the rights of employees under section 7. To this end, the Court stated that while an employer is free to communicate any of his general or specific views about a particular union, the statement may not include a "threat of reprisal or force or promise of benefit." Id. at 618. Additionally, the employer may not rely on section 8(c) to legitimize his predictions as to the effects of unionization on the company unless they are precise, based on objective fact and reflect "'what he reasonably believes will be the likely economic consequences of unionization that are outside his control.'" Id. at 619, quoting NLRB v. River Tags, Inc., 382 F.2d 198, 202 (2d Cir. 1967).

58. Id. at 71.
59. Id.
60. Id. at 72. See Archer Laundry Co., 150 N.L.R.B. 1427 (1965); Aristocrat Linen Supply Co., 150 N.L.R.B. 1448 (1965). The Board validated election results in these cases despite the employers' objections because it found the unions' appeals to black workers, based on a message of racial equality, to be relevant to election issues without being inflammatory. In NLRB v. Baltimore Luggage Co., 387 F.2d 744 (4th Cir. 1967), the court found temperately phrased letters and speeches which exhorted black employees to vote for the union to be germane to election issues without exacerbating racial prejudices, despite the purely racial character of the union message.
ize the evidence of preelection conduct for signs of purely inflammatory racial propaganda. If such flagrant racial theatrics are found to have occurred during the critical period preceding the election, it will be set aside and rescheduled by the Board at the request of the challenging party.

The Board's "laboratory conditions" standard applies to all elections and it may be disrupted by misbehavior other than racial incidents. Certainly an election coinciding with inflammatory appeals to alienage prejudice would as effectively destroy the "laboratory conditions" as provocation based on race prejudice. Alien workers, like black workers, represent a group easily distinguishable from white, native born workers; hence, with little effort aliens can be subjected to the intemperate, irrational prejudices of other employees. "Aliens as a class are a prime example of a 'discrete and insular' minority," as the Supreme Court observed in *Graham v. Richardson*. The Court has therefore established that "classification based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." Unquestionably then, to be consistent with *Graham*, the Board, when presented with election challenges supported by allegations of inflammatory appeals to alienage prejudice, should evaluate the objections in a manner commensurate with the Sewell criteria. If the Board concludes that the allegations have a rational basis in fact, it should invalidate the election and reschedule it for a later time. Although setting aside an election in which one party has manipulated the result by exploiting irrelevant issues of alienage will hardly eliminate any inbred bias against alien workers, it will help create an atmosphere in which alien workers are free to make their interests known and in which all members of the bargaining unit may make an intelligent, well informed choice concerning the question of union representation.

61. The critical preelection period during which misconduct by either party will result in the invalidation of the election commences with the filing of the petition. See National Car Corp. v. NLRB, 374 F.2d 796, 809 (7th Cir. 1967); Goodyear Tire & Rubber Co., 138 N.L.R.B. 453, 454 (1962).

62. See 138 N.L.R.B. at 71. 29 C.F.R. § 102.69(a) (1974) directs that only a party may file objections to an election. See also Shoreline Enterprises of America, 114 N.L.R.B. 716, 717 n.1 (1955); Association of Motion Picture Producers, Inc., 88 N.L.R.B. 521, n.6 (1950).

63. See note 56 supra.

64. 403 U.S. 365, 372 (1971). The Court in *Graham* struck down as violative of equal protection two state statutes which denied welfare benefits to resident aliens who had not resided in the country for a specified number of years.

65. Id. at 371-72. See Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) where the Court, after noting that the fourteenth amendment protects aliens, invalidated a California law which barred aliens from obtaining commercial fishing licenses because they failed to meet a citizenship requirement.
Traditionally, once the question of union representation is resolved in favor of a union by a valid election, and challenges sponsored by other participants are overruled, the Board certifies the bargaining unit's choice as the exclusive bargaining representative of that unit.\textsuperscript{66} Board certification provides a statutory cloak of authority and protection which few labor organizations can achieve on their own. Not only does a certified bargaining representative have the sole authority to negotiate for the entire bargaining unit, it is further insulated by the Act's prohibition of a subsequent election for twelve months.\textsuperscript{67} Additionally, once the union has successfully negotiated a bargaining agreement, in most circumstances the contract operates as a bar to a rival's election petition for up to three years.\textsuperscript{68} However, a union which unlawfully discriminates is not furnished with such comprehensive protection.

In \textit{Pioneer Bus Co.},\textsuperscript{69} the Board confronted the question of whether or not the Board's promulgated "contract bar rule"\textsuperscript{70} could be asserted to shelter a union which engaged in separate representation treatment along racial lines. The Board declared that it would not permit its contract bar rules to be utilized to shield contracts which were executed on the basis of race from the submission of appropriate election petitions. The Board emphasized that it would not enforce its contract bar rule to preserve any contract which discriminated between black and white employees on racial lines.\textsuperscript{71}

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\textsuperscript{66} Objections to the victorious union's certification grounded in allegations of invidious discrimination will be heard by the Board during a precertification hearing. See the discussion of the Board's decision in Bekins Moving and Storage Co., 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974), pp. 527-30 \textit{infra}.

\textsuperscript{67} 29 U.S.C. § 159(c)(3) (1970) provides: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held."


\textsuperscript{69} 140 N.L.R.B. 54 (1962).

\textsuperscript{70} In its Twenty-Eighth Annual Report, the Board articulated its view of the contract bar rule:

The Board has adhered to a policy of not directing an election among employees currently covered by a valid collective-bargaining agreement, except under certain circumstances. The question whether a present election is barred by an outstanding contract is determined according to the Board's contract-bar rules. Generally, these rules require that a contract asserted as a bar be in writing, properly executed, and binding on the parties; that the contract be in effect for no more than a "reasonable" period; and that the contract contain substantive terms and conditions of employment which are consistent with the policies of the Act.


\textsuperscript{71} 140 N.L.R.B. at 55. \textit{See also} Swisher & Son, Inc., 209 N.L.R.B. No. 1, 85
Contracts which are negotiated and executed in a manner which discriminates between aliens and native employees simply on the basis of citizenship should, by a parity of reasoning, receive similar treatment by the Board. As with racial discrimination, no legitimate rationale exists to support enforcement of the contract bar rule as a sanctuary for unions which refuse to integrate their representational treatment of citizen and noncitizen employees in all matters affecting employment.

The Board closed its opinion in Pioneer Bus with a warning that the execution of a racially discriminatory contract was in "patent derogation" of Board certification and "would warrant revocation of the certification."\(^7\)\(^2\) Pioneer Bus was not, however, the first instance of threatened certification revocation. In two previous cases, the Board refrained from revoking certification when the union voluntarily relinquished its certification following the institution of revocation proceedings,\(^7\)\(^3\) and when, in the second case, a union gave reasonable assurances that definite measures would be taken immediately to reform its conduct.\(^7\)\(^4\) When the union in the latter case, however, failed to heed fully the Board's admonition by continuing to engage in discriminatory treatment of black nonmembers, the Board did not capitulate. Nine years after the Board's initial warning the employees were still represented by two locals of the same union, each totally segregated by race. Local 2, whose membership was comprised of black employees, filed a petition with the Board to rescind the joint certification, charging that Local 1 (white members only) refused to represent properly black employees in grievance procedures.

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\(^7\)\(^2\) See Larus & Brother Co., 62 N.L.R.B. 1075 (1945), in which a rival union challenged the certified representative because its locals were segregated by race.

\(^7\)\(^3\) See Hughes Tool Co., 104 N.L.R.B. 318 (1953), in which a rival union sought decertification of the incumbent union because its locals were segregated by race, and because the white local charged each member of the black local $15 for each grievance filed and $400 for each arbitration proceeding while not charging the members of the white local for exercise of the same privileges. The Board in A.O. Smith Corp., 119 N.L.R.B. 621 (1957), did rescind certification for six months because the union had failed to represent properly eighteen clerical workers included in the designated bargaining unit. Also, the certification of Inside Glass Workers Local 642 was revoked by the Board in Pittsburgh Plate Glass Co., 111 N.L.R.B. 1210 (1955), because the union and employer had engaged in a policy of bargaining for union members only: "The Board wishes to make it clear that it will not countenance the flagrant disregard for its certification by an avowed policy on the part of the certified bargaining representative to represent its members only rather than all employees in the bargaining unit." \(Id.\) at 1213.
and discriminated against them merely because they were black.\textsuperscript{75} Both the trial examiner and a unanimous Board agreed that revocation of the joint certification was appropriate because the certified local executed contracts \textbf{grounded in irrelevant considerations of race} and administered the contracts in a manner which perpetuated racial discrimination in employment.\textsuperscript{76} A three member majority of the Board further elaborated that based on fifth amendment considerations the Board could not legitimately "render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative."\textsuperscript{77} Additionally, the majority asserted that revocation becomes a suitable remedy where two separate certified locals determine membership eligibility totally on the basis of race.\textsuperscript{78}

Although loss of certification, like deprivation of the contract bar rule, may be potentially devastating to a devitalized union,\textsuperscript{79} absent a viable rival the union may nevertheless be able to function well without the Board’s patronage. Also, the Board only employs its decertification strategy in circumstances typified by notorious misbehavior such as in \textit{Hughes Tool Co.}. While continuing to threaten revocation,\textsuperscript{80} the Board has actually rescinded union certification in only two instances. The first occurred in \textit{United States Baking Co.},\textsuperscript{81} where the union had divided the bargaining unit into two separate subunits solely on the basis of sex, even though both groups worked side by side on the same assembly line operation, performing virtually identical jobs.\textsuperscript{82} The second revocation occurred in \textit{Teamsters Local 671}.\textsuperscript{83} There the union not only refused to bargain for a group of part-time, nonmember warehousemen within the bargaining unit, it also coerced the employer to fire the part-time employees and replace them with full-time warehousemen by threatening to call a strike of the other full-time employees.\textsuperscript{84} The Board

\begin{footnotesize}
\begin{enumerate}
\item[75.] Metal Workers Local 1, 147 N.L.R.B. 1573 (1964).
\item[76.] \textit{Id.} at 1577.
\item[77.] \textit{Id.} For this proposition, the Board cited Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Bolling v. Sharpe, 347 U.S. 497 (1954), discussed notes 89 & 98 \textit{infra}.
\item[78.] 147 N.L.R.B. at 1577.
\item[79.] For example, the Independent Metal Workers, whose certification was revoked by the Board in \textit{Hughes Tool Co.}, lost an election in the Hughes bargaining unit it had represented for more than twenty years. \textit{See} Sherman, \textit{Union's Duty of Fair Representation and the Civil Rights Act of 1964}, 49 MINN. L. REV. 771, 783 n.56 (1965).
\item[80.] The Board has warned that certification is subject to revocation when the union fails to comply with its statutory duty to represent all unit employees. \textit{See} American Mailing Corp., 197 N.L.R.B. 246, 247 (1972); Gino Morena Enterprises, 181 N.L.R.B. 808 (1970); Alto Plastics Mfg. Corp., 136 N.L.R.B. 850, 854 (1962).
\item[81.] 165 N.L.R.B. 951 (1967).
\item[82.] \textit{See id.} at 952.
\item[83.] 199 N.L.R.B. 994 (1972).
\item[84.] \textit{Id.} at 999-1001.
\end{enumerate}
\end{footnotesize}
concluded in each case that revocation was appropriate because the union had failed to represent properly all members of the designated bargaining unit as required by their certification. Based on these decisions, the Board could effectively utilize its decertification prerogatives when it is alerted to the policies of a union which denies full membership to aliens while segregating them from other workers and refusing to bargain or process grievances on their behalf.

Rather than revoking a collective bargaining representative's certification, the Board in mid-1974 embarked upon a new scheme of reviewing union conduct prior to certification which bears strategic remedial potential for alien employment discrimination. This pivotal advancement in the Board's sentiment was articulated in the majority opinion in *Bekins Moving & Storage Co.* The employer in *Bekins* filed a motion seeking to dismiss the election petition of a Teamsters local on the grounds that the union engaged in invidious discrimination on the basis of sex, alienage and national origin. A three member majority of the Board declared that the Board is constitutionally foreclosed from certifying a bargaining representative which discriminates on the basis of race, alienage or national origin. Also, the majority announced that the merits of an employer's allegations of union discrimination would be considered prior to the issuance of Board certification but only subsequent to an election in which the union has been successful. The essence of these conclusions was embodied in the majority's judgment that the due process clause of the fifth amendment prohibits the Board from conferring the benefits of certification upon a labor union which has been shown to be engaged in a "pattern and practice of invidious discrimination." Member Kennedy, concurring in the result, contended that federal certification of a union which excludes employees from membership on the basis of

86. 86 L.R.R.M. at 1325. The majority declined to authorize a review of union conduct for discriminatory practices based on sex. Member Kennedy, noting that the Equal Rights Amendment has yet to be ratified, was unable to find Supreme Court precedent which included sex among the previously established suspect classifications of race, alienage and national origin. Therefore, while agreeing that employment discrimination based on sex may establish a breach of the duty of fair representation in a post-certification proceeding, he refused to regard precertification allegations of sex discrimination as a constitutional issue.
87. Id. The Board reaffirmed its policy of expediting elections so that the employees' wishes can be determined without undue delay and employers are prevented from interposing insubstantial pre-election objections to gain additional time to undermine the union.
88. Id. The majority observed that the fifth amendment forbids the Board as an "arm" of the federal government from participation in invidiously discriminatory conduct.
race, alienage or national origin would constitute an unconstitutional ratification of private discrimination. 89

This determination, however, represents the extent of the majority’s agreement on the power of the Board to entertain objections to certification based upon discriminatory union conduct. Chairman Miller and Member Jenkins would have modified the majority’s position so as to require a precertification inquiry as to a union’s willingness and capacity to fairly represent all employees in the bargaining unit on an equal basis regardless of their membership status. They contended that the duty of fair representation has a constitutional foundation which obligates the Board to determine whether or not the union has a demonstrable propensity to fulfill its duty to fairly represent all employees before certification is appropriate or constitutionally permissible. 90 Thus Messrs. Miller and Jenkins asserted that the Board does not lack “the statutory power to withhold the certification, but rather the constitutional power to confer it.” 91 However, the notion that the duty of fair representation is a constitutional imperative was unacceptable to Board Member Kennedy who argued that the obligation is imposed by statute as a corollary to the authority conferred by section 9(a) 92 to function as an exclusive bargaining agent. Accordingly, because he contended that the duty of fair representation accrues only upon statutory certification, Member Kennedy would defer any examination of a union’s default on this obligation until after certification has been issued. 93

The dissenters, Members Fanning and Penello, with some diffidence evaded a definitive analysis of the fair representation issue in denouncing the

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89. Id. at 1329. Board Member Kennedy relied on the Supreme Court’s opinion in Bolling v. Sharpe, 347 U.S. 497 (1954), which declared that racial segregation in the public schools of the District of Columbia was a denial of due process of law guaranteed by the fifth amendment.

90. 86 L.R.R.M. at 1326.

91. Id. at 1325. Chairman Miller and Board Member Jenkins found support for their position in the Fifth Circuit’s statement in Rubber Workers Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966): “Indeed, the Supreme Court has indicated that any statute purporting to bestow upon a union the exclusive right to represent all employees would be unconstitutional if it failed to impose upon the union this reciprocal duty of fair representation.” Id. at 17, citing Steele v. Louisville & N.R.R., 323 U.S. 192, 198-99 (1944).


93. 86 L.R.R.M. at 1331 (Member Kennedy, concurring). In his discussion of the origin of the duty of fair representation, Board Member Kennedy pointed to language from several Supreme Court decisions involving issues of fair representation. Each of the opinions from which he extracted quotations refers to the union’s “statutory duty” to fairly represent all employees in collective bargaining and contract enforcement. See Vaca v. Sipes, 386 U.S. 171, 177 (1967); Humphrey v. Moore, 375 U.S. 335, 342 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); Steele v. Louisville & N.R.R., 323 U.S. 192, 198-99 (1944).
majority’s primary conclusion that certification should be denied discrimi-
nating labor organizations. Withholding certification in such circumstances,
the dissenters believed, is neither constitutionally mandated nor sanctioned
by the NLRA and will potentially disrupt federal enforcement of the anti-
discrimination provisions of Title VII.\textsuperscript{94} They were, however, unable to
marshal the support of any major authority to fortify their condemnation of
the majority’s constitutional rationale for denying certification to discrimi-
nating unions. They blithely sidestepped the constitutional issue by urging
that immediate certification would place minority group employees in a posi-
tion either to eliminate discriminatory policies from within or to petition the
Board or the Equal Employment Opportunity Commission (EEOC) to apply
a post-certification remedy.\textsuperscript{95} The dissenters also referred to the language of
section 9(c) of the NLRA, which provides that the Board “shall direct an
election” and “shall certify the results thereof.”\textsuperscript{96} Such language, they main-
tained, is mandatory and requires the Board to certify, without exception, any
union which has won a Board directed election.\textsuperscript{97} Again, however, Members
Fanning and Penello failed to reconcile their sentiments with the omnipresent
requisites of the fifth amendment’s due process clause, which the Supreme
Court has invoked to prohibit federal agencies from implicitly sanctioning dis-
criminatory practices of private organizations despite the compulsory tenor
of any legislative instruction.\textsuperscript{98}

The potential benefits flowing to aliens from \textit{Bekins} are easily discernible
from the Board’s conclusion that it is constitutionally prohibited from certify-
ing a union which discriminates against aliens. Nevertheless, the efficacy of
this new anti-discrimination procedure depends completely upon the
standards which the Board promulgates and the manner in which they are
applied during a precertification review of union behavior. Although the

\textsuperscript{94} 86 L.R.R.M. at 1331. \textit{See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §
2000(e)-(e)(17) (1970).}

\textsuperscript{95} Members Fanning and Penello suggested that since employees are individually
permitted to file unfair labor practice charges with the Board or unfair employ-
ment practice complaints with the Equal Employment Opportunity Commission, they
will be fully protected by federal supervision of the union-employee relationships
after the allegedly discriminatory union is certified. To the majority such a no-
tion was somewhat anomalous because it provides “the discriminator with a further
opportunity to discriminate in order that [the Board] may better hold him ac-
countable for his actions, a bit like inviting the fox into the chicken coop to have
a better opportunity to watch him.” 86 L.R.R.M. at 1326 (Members Fanning & Penello,
dissenting).

\textsuperscript{96} 29 U.S.C. § 159(c) (1970).

\textsuperscript{97} 86 L.R.R.M. at 1333-34 (Members Fanning & Penello, dissenting).

Hodge, 334 U.S. 24 (1948) (power of federal courts subject to federal policy against
protecting private discriminatory conduct).
Board has taken several opportunities to employ the *Bekins* rationale in declaring that an employer’s allegation of discriminatory union policies is beyond the scope of a pre-election hearing,\(^9\) at this juncture the Board has only twice been presented with postelection challenges to certification. In the first of these decisions, issued on the same day as *Bekins*, the dissenters in *Bekins*, joined by Member Kennedy, refused to deny certification to a union alleged to have engaged in sex discrimination.\(^{100}\)

A second case marking the Board’s development of this innovative approach, *Grants Furniture Plaza*,\(^{101}\) is more instructive, for it displays the manner in which challenges to certification subsequent to an election will be reviewed. The original *Bekins* majority, with Member Kennedy again concurring, ruled that an employer’s allegations of union discrimination against women and Spanish-surnamed individuals, which were supported by statistical data and included a copy of a Department of Justice complaint accusing the union of perpetuating prior discriminatory practices against blacks as well as Spanish-surnamed individuals, failed to prove sufficient facts to justify a refusal to certify the union.\(^{102}\) The standard fabricated by the *Grants* majority is unquestionably rigorous. Before it will withhold certification the Board must be convinced by “affirmative evidence of a factual nature” constituting “prima facie factual proof” of discriminatory union behavior.\(^{103}\) Neither the Department of Justice complaints nor the employer’s statistical data proffered such dynamic evidence. The *Grants* majority declared that the challenging employer must, as a prerequisite to denial of certification, demonstrate factually that the union, through a hiring hall or other means, exercises control “over the racial, sexual, or ethnic composition of those who enter the work force and, thus, those who become its members.”\(^{104}\) In the

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100. See Bell & Howell Co., 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172 (1974). Member Kennedy based his opinion upon the rationale explicated in his *Bekins* concurrence. See note 86 supra.


102. 87 L.R.R.M. at 1176. Members Fanning and Penello concurred in the certification of the union for reasons expressed in their *Bekins* dissent.

103. *Id.*

104. *Id.* When the employer is unable to provide such convincing evidence, the majority declared that the Board will infer that the employers in the area exercise the actual control over the ethnic, racial and sexual composition of the work force. *Id.*
absence of such factual evidence, the majority asserted that the Board will not countenance any inferences of a union's propensity to engage in employment discrimination and will thereby deny the employer's allegations. 105

Although individual aliens cannot challenge the election of a union which treats them unfavorably and thereby block the union's certification, 106 they may rely, in most cases, on the employer to make such a challenge. When an employer realizes that a union's discriminatory conduct may forestall his obligation to bargain with it, the employer may well become an overnight champion of the employment-related interests of aliens in the designated bargaining unit. Even though the employer may be acting partially or totally upon personal motivation, aliens' interests may be enhanced because unions which face a certification struggle will be inspired to reorient their perspective on the proper treatment of aliens. 107 While Bekins puts the carrot on the stick, Grants, in putting the employer to a more strenuous proof, lengthens the stick. But the enticement survives with enough vitality to ensure that employers may find it to their own advantage to protect the interests of aliens while endeavoring at the same time to promote their own.

The stringent standards established by the Board in Bekins for precertification reviews of union discriminatory conduct are a thoughtful and prescient response to the far less rigorous criteria articulated by the Eighth Circuit in NLRB v. Mansion House Center Management Corp. 108 In Mansion House, a contentious anti-union employer refused to bargain with Local 115 of the Brotherhood of Painters upon its presentation of union authorization cards signed by a majority of the painters employed by Mansion House Corporation. 109 Subsequently, the employer fired all the painters for such im-

105. Id.
106. See note 62 supra.
107. The amount of protection aliens can expect to receive as a result of such a precertification skirmish clearly depends upon how essential Board certification is to the survival of the discriminating union. If the union has the support of a formidable majority of employees, it may be able to force the employer to bargain without the Board's assistance and therefore continue to discriminate against aliens without interruption.
109. The Board concluded that a remedial bargaining order was appropriate under the standards delineated in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). Primarily, bargaining orders are issued by the Board after a union has been certified but the employer unjustifiably refuses to bargain in violation of section 8(a)(5), 29 U.S.C. § 158(a)(5) (1970). However, in Gissel the Supreme Court held that the duty to bargain may arise independently of the formal certification process upon the presentation of union authorization cards. Furthermore, a bargaining order is the appropriate remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union's majority and make a fair election impossible.
pertinent reasons that the Board decided to issue a bargaining order, among other measures, to remedy the employer's conduct. The employer argued against the issuance of a bargaining order by alleging that the union's membership policies discriminated against black painters. The trial examiner, with the Board's approval, refused to consider the employer's evidence of race discrimination. However, an Eighth Circuit panel, upon the Board's petition for enforcement, condemned the Board for refusing to examine the employer's evidence and rejected enforcement of the bargaining order. Speaking for the unanimous panel, Judge Lay declared that the Board, in requiring a challenging employer to demonstrate the actual practice of discrimination, had applied the wrong standard when deciding the issue of certification in the face of racial discrimination allegations. The court directed the Board to employ a less rigorous measure of proof in discrimination cases. Modeling its approach upon the procedure often utilized in Title VII cases, the court asserted that the Board should consider geographical statistical data and evidence of past discriminatory practices as crucial factors in ascertaining whether or not sufficient evidence exists to create a prima facie case of racial discrimination. Upon presentation of statistical evidence which corroborates other evidence of past racial discrimination, the court admonished the Board to conduct its own investigation of the union's admission procedures, application methods and similar membership policies and to "inquire whether the union has taken the initiative to affirmatively undo its discriminatory practices." Since the Board, in rejecting the employer's evidence, did not employ these less restrictive criteria, the court refused enforcement of the bargaining order. The court asserted that nonenforcement of the bargaining order was necessary in this case to prevent the remedial machinery of the NLRA from benefiting a union which engaged in racial discrimination.

The Eighth Circuit's Mansion House doctrine, if subscribed to by other circuits, presents yet another potential hurdle which a union that discriminates against aliens must clear before the collective bargaining relationship contemplated by the NLRA reaches fruition. However, it seems clear from Bekins that the Board will not synchronize its standard of proof in reviewing challenges to certification with the criteria prompted by the Eighth Circuit in Mansion House. The irreconcilability of the two judgments is more evident

110. 473 F.2d at 475.
112. 473 F.2d at 476. The Eighth Circuit panel relied on its own decision in Marquez v. Omaha Dist. Sales Office, Ford Div., 440 F.2d 1157 (8th Cir. 1971), as an example of the proper method of resolving allegations of unfair employment practices in Title VII cases.
113. 473 F.2d at 477.
114. Id.
after examining the conflicting policies which influence the persuasion of each forum. The Board, for instance, has always highly regarded the policy of permitting employees to exercise an unfettered choice in deciding issues of representation.\textsuperscript{115} To facilitate the designation of employee representatives, the Board has established election procedures designed to expeditiously certify labor unions selected by employees to represent them.\textsuperscript{116} Furthermore, this policy dovetails with another which seeks to avoid unnecessary delays in establishing the parties' duty to bargain during which a truculent employer may severely undermine the union's support among employees or its bargaining position. Thus, the Board in \textit{Bekins} prohibited the consideration of allegations of union misconduct in the treatment of minorities until after the election.

Balanced against these factors designed to insulate unions from detrimental employer conduct is the countervailing policy of constitutional dimension which prohibits agencies of the federal government from facilitating private discrimination based on race, alienage or national origin. The \textit{Mansion House} court, while seeking to promote the constitutional requirement, subverted the Board's policy of quickly establishing the parties' duty to bargain to a degree which is potentially inimical to implementation of the union's function in the collective bargaining process. In refusing to enforce the Board's bargaining order which was prompted by serious pre-election employer misconduct, the court in \textit{Mansion House} gives the employer a significant advantage—time to destroy the union's majority status before it is officially recognized in an election supervised by the Board. In contrast, the Board, while recognizing its constitutional obligation to refrain from certifying a union which engages in invidious discrimination against employees, undertakes a well balanced position. By requiring employers to meet a more stringent standard of proof in a post-election hearing, the Board precludes attempts by employers to circumvent their duty to bargain with the statutory representatives of their employees by filing groundless objections to certification. The \textit{Bekins-Grants} rationale will indemnify unions against purely dilatory employer tactics, while authorizing a denial of certification in legitimate, well documented instances of discriminatory behavior by unions which have won representation elections.

\textbf{B. Unfair Labor Practices}

Aliens who have been victimized by employment discrimination may, as charging parties, file unfair labor practice charges with the Board against bar-

\textsuperscript{115} See nn. 53 & 54 & p. 521 \textit{supra}.

\textsuperscript{116} 86 L.R.R.M. at 1329 (Member Kennedy, concurring).
A distinct advantage of successfully prosecuting an unfair labor practice charge is that the Board is authorized by section 19(c) of the NLRA to take affirmative action against the offending party by ordering such reparations as reinstatement of the aggrieved employee with back pay and full seniority rights, and other remedial measures. Alien employees, as aggrieved parties, may be compensated for the harm suffered from interference with their job rights if it can be shown that the employer or bargaining representative has engaged in employment discrimination in a manner prohibited by section 8 of the Act. The primary dilemma is to identify the type of alien employment discrimination which section 8 was to proscribe.

1. Nonperformance of the Duty of Fair Representation as an Unfair Labor Practice. The Board's initial enforcement of the judicially recognized duty of fair representation occurred in Miranda Fuel Co., a case in which there were no issues of employment discrimination based upon race, alienage, sex, national origin or lack of union membership. The aggrieved party in Miranda, Michael Lopuch, received permission from the employer to depart on an extended leave of absence three days early. Shortly after his return to work, Lopuch was dropped to the bottom of the seniority list by the employer at the insistence of the union because of his early departure. In the unfair labor practice action which followed, the Board recognized that the privilege of acting as an exclusive bargaining representative, derived from section 9 of the NLRA, necessarily included the obligation to fairly represent all members of the bargaining unit. Furthermore, the Board declared that the section 7 right of employees "to bargain collectively through representatives of their own choosing" extends to the employees "the right to be

118. Section 19(c), 29 U.S.C. § 160(c) (1970), provides: "The Board . . . shall issue . . . an order requiring [the offending party] to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . ."
119. Section 8, 29 U.S.C. § 158 (1970) identifies employer or union conduct which constitutes unfair labor practices under the Act.
120. 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).
121. 29 U.S.C. § 159(a) (1970) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."
122. 29 U.S.C. § 157 (1970) provides: "Employees shall have the right to self-organization . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . ."
free from unfair or irrelevant or invidious treatment by their exclusive bar-
gaining agent in matters affecting their employment.”

Since the union's discriminatory treatment of Lopuch constituted a breach of the union's duty of fair representation which consequently hampered Lopuch's exercise of his section 7 rights, the Board declared that the union conduct violated section 8(b)(1)(A). Similarly, because the employer acquiesced in the union's discriminatory conduct, it too was responsible for interfering with Lopuch's section 7 rights and so was held to have violated section 8(a)(1) of the Act. The dissenting Board members and the majority of the Second Circuit panel, which refused to enforce the Miranda holding, rejected the notion that the duty of fair representation is incorporated among the section 7 rights of employees or that sections 8(a)(1) and 8(b)(1)(A), which were designed to protect section 7 rights, were violated by the union's conduct. Congress, the Board dissenters asserted, furnished a remedy in the courts for a breach of the duty of fair representation which made unwarranted any such extension of the Board's authority.

Uninhibited by the dissenters' objections, the majority augmented their holding by finding that the union and employer violated section 8(b)(2)

123. 140 N.L.R.B. at 185.
124. 29 U.S.C. § 158(b)(1)(A) (1970) provides: "It shall be an unfair labor prac-
tice for a labor organization or its agents—(1) to restrain or coerce (A) employees in
the exercise of the rights guaranteed in section 157 of this title . . . ."
125. 29 U.S.C. § 158(a)(1) (1970) provides: "It shall be an unfair labor practice
for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of
the rights guaranteed in section 157 of this title . . . ."
126. 326 F.2d 172 (2d Cir. 1963). Without reaching a majority conclusion on the
issue of whether or not a union's unfair representation constitutes an unfair labor prac-
tice, Judge Medina and Chief Judge Lumbard agreed that the conduct of the union and
the employer did not violate sections 8(a)(3) and 8(b)(2) because their actions were
"wholly unrelated to the affected employee's relationship with the union." Id. at 180
(Lumbard, C.J., concurring). Judge Medina refused to recognize the alleged section 8
(b)(1)(A) violation on the grounds that the Board had overextended the scope of its
surveillance, raising potentially severe preemption problems. Chief Judge Lumbard found
the Board's evidence of hostility and unfair treatment was insufficient for the court even
to consider whether invidious conduct in violating the duty of fair representation may
also violate section 8(b)(1)(A). In his dissenting opinion, Judge Friendly argued that
the Board's judgment against the union under section 8(b)(2) and against the employer
under section 8(a)(3) should have been sustained. Instead of relying on the Board's
duty of fair representation analysis, Judge Friendly concluded that the union's conduct
might tend to encourage membership in any labor organization or at the very least in-
struct the bad or indifferent members to become good members. The Board, he main-
tained, could lawfully conclude that the unjustifiable demotion of any employee would
encourage or discourage membership in a union in violation of sections 8(b)(2) and
8(a)(3). Id. at 180-86 (Friendly, J., dissenting).
127. 140 N.L.R.B. at 200-02.
128. 29 U.S.C. § 158(b)(2) (1970) provides: "It shall be an unfair labor practice
and section 8(a)(3),\textsuperscript{129} respectively. Noting that an 8(b)(2) violation stems from union conduct which causes or attempts to cause an employer to discriminate against an employee so as to encourage or discourage union membership, the Board concluded that the foreseeable result of the union's mistreatment of Lopuch would encourage union membership among nonmembers and intimidate current union members in such a way as to encourage them to become "good" union members.\textsuperscript{130} This conclusion occasioned an even more caustic response from the dissenting members. Chairman McCulloch and Member Fanning asserted that the majority's analysis overlooked the literal language of sections 8(b)(2) and 8(a)(3) which, in addition to requiring discriminatory treatment of certain employees, compelled the Board to find that the employer's conduct at the behest of the union actually encouraged or discouraged membership, not merely that it exhibited such a potential.\textsuperscript{131} The simple fact that the union had the power under the contract to determine the seniority rights of the employees may be sufficient to create an inference of bad motive, but such an inference was not tantamount to the production of actual proof. The dissenters referred to the Supreme Court's opinion in \textit{Teamsters Local 357 v. NLRB}\textsuperscript{132} in which the Court observed that evidence of the "true purpose" or "real motive" constitutes the test of an 8(b)(2) violation.\textsuperscript{133} The union's action against Lopuch, who was a union member, benefited all the employees who rose one notch on the seniority scale whether or not they were union members. In concluding, the dissenters asserted that the absence of actual evidence of disparate treatment between members and nonmembers as a result of the union's conduct prohibited the Board from finding that union membership

\textsuperscript{129} 29 U.S.C. § 158(a)(3) (1970) provides: "It shall be an unfair labor practice for an employer to discriminate against an employee in violation of subsection (a)(3) of this section . . . ."

\textsuperscript{130} 140 N.L.R.B. at 186-87. In reaching this conclusion the majority relied on the rationale of \textit{Radio Officers' Union v. NLRB}, 347 U.S. 17 (1954). In \textit{Radio Officers} the Supreme Court affirmed that sections 8(a)(3) and 8(b)(2) were designed to permit employees to freely exercise their rights to join or not to join unions and to be good, bad or indifferent members. These sections, the Court stated, prescribe conduct which encourages members to remain in good standing with the union. 347 U.S. at 40-42.

\textsuperscript{131} 140 N.L.R.B. at 193-94.

\textsuperscript{132} 365 U.S. 667 (1962).

\textsuperscript{133} Id. at 675. In his concurring opinion in \textit{Local 357}, Justice Harlan agreed that an "affirmative showing of a motivation" to encourage or discourage union membership or activity is essential to establish a breach of sections 8(b)(2) and 8(a)(3). \textit{Id.} at 680.
was encouraged or discouraged in violation of sections 8(b)(2) and 8(a)(3).  

Despite the Second Circuit's unenthusiastic reception of the Miranda decision, the Miranda majority on the Board continued to chaperone union conduct to enforce the duty of fair representation. In Metal Workers Local 1, the Board was confronted with an unfair labor practice allegation and a challenge to the union's certification. The same Board members who comprised the majority in Miranda agreed with the trial examiner that the union, by failing to consider in any fashion the grievance filed by a black bargaining unit member alleging discrimination based on race, violated sections 8(b)(1)(A) and 8(b)(2) of the NLRA. Faced with evidence of an egregious breach of the duty of fair representation, the Board authorized the addition of a third rationale to fortify the protective configuration of Miranda by holding that the union had breached its duty to bargain, in violation of section 8(b)(3). A refusal to process a meritorious grievance, the trial examiner noted, is the equivalent of a refusal to bargain. The duty to bargain, he asserted, is an obligation which the union owes to the members of the bargaining unit as well as to the employer. Hence, in adopting a policy of prosecuting only members' grievances, the union has contravened its responsibility to bargain on behalf of all bargaining unit members.

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134. In its Twenty-Third Annual Report, the Board discussed the proper application of section 8(a)(3) to conduct which discriminates against protected activities. To support a finding that section 8(a)(3) has been violated, the record in the case must show that the complaining employees were in fact discriminated against because of activities protected by section 7 of the act and that the discrimination tended to encourage or discourage union membership.

NLRB, TWENTY-THIRD ANNUAL REP. 63-64 (1959) (emphasis added). The Board went on to explain that an employer cannot be found to violate section 8(a)(3) unless independent evidence exists to establish that the employer intended to discourage the exercise of section 7 rights. Id. at 64-70. Simply stated, the Board's position precludes the application of sections 8(a)(3) and 8(b)(2) unless it can be demonstrated that the employer, having been coerced by the union, altered an employee's work status because he exercised his section 7 rights either to engage in concerted activities or to refuse to engage in such activities.

135. See note 126 supra.


137. Id. at 1574.

138. See pp. 514-19 supra.

139. 29 U.S.C. § 158(b)(3) (1970) provides: "It shall be an unfair labor practice for a labor organization or its agents—(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title . . . ."

140. See 147 N.L.R.B. at 1604. While further explicating its section 8(b)(3) theory in Longshoremen's Local 1367, 148 N.L.R.B. 897 (1964), the Board suggested that the provisions of section 8(d) obligate employers and unions to "confer in good faith" to produce lawful agreements:
In addition to reiterating the objections to the majority's 8(b)(1)(A)-8(b)(2) thesis which were elucidated in their *Miranda* dissent, Chairman McCulloch and Member Fanning found the 8(b)(3) theory equally unsavory. The legislative history of section 8(b)(3), the dissenters maintained, demonstrated conclusively that the section was designed to function as a counterpart to section 8(a)(5), which limits the employer's bargaining duty entirely to the union. Since section 8(d), which defines the duty to bargain, refers to the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith," the dissenters concluded that section 8(b)(3) describes a union's obligation to bargain owed to employers and not to employees.

Notwithstanding their criticism of the majority's position, the dissenting members did concur in finding a violation of section 8(b)(1)(A) upon a more restricted rationale. Instead of resting their judgment upon the non-performance of the duty of fair representation, the dissenters were convinced that the union violated section 8(b)(1)(A) simply by refusing to process

Because collective-bargaining agreements which discriminate invidiously are not lawful under the Act, the good faith requirements of Section 8(d) necessarily protect employees from infringement of their rights; and both unions and employers are enjoined by the Act from entering into contractual terms which offend such rights . . . . Section 8(d) cannot mean that a union can be exercising good faith toward an employer while simultaneously acting in bad faith toward employees in regard to the same matters . . . . We conclude that when a statutory representative negotiates a contract in breach of the duty which it owes to employees to represent all of them fairly and without invidious discrimination, the representative cannot be said to have negotiated the sort of agreement envisioned by Section 8(d) nor to have bargained in good faith as to the employees whom it represents or toward the employer.

*Id.* at 899-900.

141. 29 U.S.C. § 158(a)(5) provides: "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

142. The dissenting members referred to a House Conference Report which in commenting on section 8(b)(3) stated: "This provision . . . imposed upon labor organizations the same duty to bargain which under section 8(a)(5) . . . was imposed on employers." 147 N.L.R.B. at 1593, quoting H.R. REP. No. 510, 80th Cong., 1st Sess. 43 (1947).

143. 29 U.S.C. § 158(d) provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

144. 147 N.L.R.B. at 1591-93.
an employee's grievance because of his nonmembership, irrespective of the union's racial motivation for denying the employee an opportunity to become a full member. The majority, in replying to this diagnosis, posed a hypothetical situation which illuminates the central conflict in the differing persuasions. Does a bargaining representative, with an integrated membership which refuses on racial grounds, as distinguished from membership grounds, to process the meritorious grievance of a black member in an effort to keep black employees in inferior jobs, violate section 8(b)(1)(A)? Since a union member in such circumstances is not being discriminated against on the invidious basis of nonmembership, the dissent would find no 8(b)(1)(A) violation. The majority, however, having woven the duty of fair representation into the section 7 scheme, declared that refusal to process a grievance on racial grounds alone contravenes the union's obligation to fairly represent all employees in the bargaining unit and therefore restrains or coerces employees in the exercise of section 7 rights.

The Miranda-Hughes majority's section 8(b)(1)(A) consensus received judicial endorsement from two Fifth Circuit panels in Rubber Workers Local 12 v. NLRB and NLRB v. Longshoremen's Local 1367. Local 12, the statutory representative in the former case, refused to process the grievances of several black employees who had been laid off for extensive periods while white workers with less seniority remained on the job and while new white applicants were hired by the employer. In the second case, Local 1367, which admitted only white longshoremen to its membership, maintained and enforced a 75-25 percent work distribution contract provision based on race and union membership between its own members and those of a sister local composed entirely of black members. Additionally, Local 1367 maintained an arrangement which forbade the assignment of white and black gangs to the same ship hatches.

In both cases the Board declared that the unions involved failed to comply with their duty as exclusive bargaining representatives to represent fairly all members of the bargaining unit in violation of section 8(b)(1)(A). Based on the Hughes Tool Co. rationale, the Board also concluded that the union's discriminatory conduct violated sections 8(b)(2) and (3). Without reaching the 8(b)(2) and (3) issues, the Fifth Circuit panels en-

145. See id. at 1584-90.
146. See id. at 1575.
147. 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).
148. 368 F.2d 1010 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).
149. See Rubber Workers Local 12, 150 N.L.R.B. 312 (1964); Longshoremen's Local 1367, 148 N.L.R.B. 897 (1964).
forced the Board’s 8(b)(1)(A) judgment. In *Rubber Workers Local 12*, Judge Thornberry, speaking for a unanimous panel, declared that the duty of fair representation which is implicit in the exclusive bargaining provision of section 9(a) “comprises an indispensable element of the right of employees to bargain collectively through representatives of their own choosing” as guaranteed in section 7. Hence, the court concluded that summarily refusing to prosecute the black employees’ grievances concerning seniority and segregated job facilities restrained those employees in the exercise of their section 7 rights in violation of section 8(b)(1)(A).

The decisions in *Miranda* and *Hughes Tool Co.* represent the Board’s most auspicious patronage of the duty of fair representation. The application of the *Miranda* rationale in Board cases has been far more constrained than originally anticipated by its critics. Presently, the Board appears reluctant to rely on *Miranda* or to remedy an unfair representation charge that fails to meet the traditional 8(b)(1)(A) or 8(b)(2) specifications. The Board, however, has fashioned an exception to this trend for hiring hall or referral cases which include issues of discrimination against disfavored groups and for cases in which seniority lists of merged companies are “endtailed” instead of being “dovetailed” with the larger successor employer’s bargaining unit seniority scale. In two disassociated cases involv-
ing the Pacific Maritime Association and separate locals of the International Longshoremen's and Warehousemen's Union, the Board registered its mechanical approval of the trial examiner's ruling that the unions' behavior in operating their respective hiring halls constituted unfair labor practices.\textsuperscript{158} The union in the earlier of these two cases, \textit{Longshoremen's Local 13},\textsuperscript{157} registered longshoremen as either A employees (fully registered longshoremen), B employees (limited registered longshoremen) or casuals. Group A employees were given initial preference, followed by group B employees, while casuals were referred only if all class A and class B longshoremen were already working. The union also employed a sponsorship arrangement by which employees could only become class B registrants through the sponsorship of a class A longshoreman. The trial examiner observed that a union's actions with regard to employees must bear "a reasonable relationship to its function as either the bargaining agent or as a labor organization."\textsuperscript{158} No such reasonable relationship was present, the examiner concluded, where the union accorded registration to applicants because they happened to know a class A registrant and denied it to those who were unacquainted with a willing sponsor.\textsuperscript{159} Classification of applicants on such an arbitrary and unfair basis, in the examiner's estimation, breached the union's duty to refrain from conduct which adversely affects the employment status of bargaining unit employees or applicants in violation of sections 8(b)(1)(A) and 8(b)(2).\textsuperscript{160}

The discriminatory pattern in the most recent case, \textit{Pacific Maritime Association},\textsuperscript{161} was devised with less imagination. The business agent of Long-
shoremen's and Warehousemen's Local 52 refused to refer several women to available waterfront employment through the union's exclusive hiring hall. When questioned by the women, the agent declared that there were no jobs on the waterfront on the Pacific Coast for women and that they would never work there. Thereafter the women applicants, having spoken with the employer's condescending and equally dismayed area manager, filed unfair labor practice charges with the Board. The trial examiner, whose opinion the Board adopted, framed his ruling in the language of Miranda. Observing that there were no grounds for drawing a distinction between discrimination based on race and that based on sex, the examiner concluded that Local 52, by refusing to dispatch the women "upon the irrelevant, invidious and unfair consideration of their sex, breached its duty of fair representation in violation of Section 8(b)(1)(A) and (2)." Largely because they both simply echo the trial examiner's ruling, Local 13 and Pacific Maritime do not constitute ringing endorsements of Miranda. However, even though both decisions fail to fully illuminate the Board's current formula for ascertaining a Miranda violation, they should create a viable precedent to be utilized by aliens who have suffered invidious employment discrimination while seeking work through a statutory representative's exclusive hiring hall.

A recent Board decision which viewed unfair representation as an unfair labor practice, Barton Brands, Ltd., represents a more stalwart ratification of the Miranda theory. A three member panel of the Board overruled, by a 2-1 majority, a trial examiner's judgment that the union representing the larger bargaining unit in a plant merger case did not engage in unfair labor practices by placing the "merged" bargaining unit members at the bottom of the new composite seniority scale. After surveying the Miranda rationale, the Board declared that the union violated its duty to fairly represent all the employees in the bargaining unit when it "endtailed" the "merged" employees to advance the political cause of a union official facing a battle for re-election. The Board referred to its earlier decision in Truck Drivers Local 568 in which it had approved a trial examiner's reliance on Miranda in a similar plant merger fact pattern. In Local 568 the offending union promised members of its own larger bargaining unit that the seniority list of the

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162. 85 L.R.R.M. at 1390-91. Member Fanning, concurring in the Board's judgment, declined to rely solely on the rationale of Miranda. He asserted that because there was no job related basis for the discrimination against women, the union's conduct underlined its power to make employment dependent upon union membership. Furthermore, such arbitrary union behavior, in his opinion, interfered with the prospective employee's section 7 rights in violation of sections 8(b)(1)(A) and 8(b)(2).


164. 87 L.R.R.M. at 1233.

smaller "merged" unit would be "endtailed" with its own seniority scale to assure that the union would receive enough votes from the larger unit to win election against the rival representative of the smaller unit. In the view of the examiner such arbitrary conduct, designed to assure the continuation of the union's representative status, breached the union's duty of fair representation and violated section 8(b)(1)(A).\textsuperscript{166} Observing that the duty of fair representation is a constant obligation, the Board in \textit{Barton} reaffirmed \textit{Local 568}'s utilization of \textit{Miranda} in bargaining unit merger cases. This continuing obligation, the Board noted, is violated when a certified representative takes a position for partisan political reasons.\textsuperscript{167} The Board added that when a bargaining representative "attempts to cause or does cause an employer to derogate the employment status of an employee"\textsuperscript{168} for such arbitrary or irrelevant reasons or on the basis of an unfair classification, that union as well

\textsuperscript{166} 157 N.L.R.B. at 1245. The United States Court of Appeals for the District of Columbia Circuit unanimously affirmed the decision in \textit{Local 568}. The court observed that the facts presented sufficient evidence for the Board properly to conclude that the offending union's election conduct breached its obligation to represent fairly all employees in the unit. The primary issue which the court identified was whether the threat of future action which clearly would violate the union's duty of fair representation constituted an unfair labor practice. The court concluded that at the point the union committed itself to breach the duty of fair representation by "endtailing" the seniority lists, it restrained the bargaining unit employees in the exercise of their section 7 rights. Section 7, the court added, guaranteed employees a free choice, absent improper pressures, in the selection of a bargaining agent. The union action, which prevented such a free choice in this case, violated section 8(b)(1)(A). \textit{See} 379 F.2d at 144-45.

\textsuperscript{167} 87 L.R.R.M. at 1233. The Board has also found a breach of the duty of fair representation to have occurred in less egregious circumstances. In \textit{Teamsters Local 396}, 203 N.L.R.B. No. 125, 83 L.R.R.M. 1472 (1973), \textit{enforced}, 509 F.2d 1075 (9th Cir. 1975), the union decided to "endtail" rather than "dovetail" the seniority designation of six employees who had been transferred to Local 396's geographical district by the employer. The Board declared that the union's refusal to process grievances filed by the transferees attacking the "endtailing" scheme constituted unfair representation in violation of section 8(b)(1)(A). Seeking to protect the seniority status of its own members, Local 396 alleged that its conduct was supported by the collective bargaining agreement. The Board determined that arbitration was the appropriate means of resolving the conflicting interpretation of the agreement as well as securing an impartial resolution of the grievances. Additionally, the Board amplified its order by requiring the union to pay the legal fees which would be incurred in the employees' retention of private counsel to represent them during the arbitration. A Ninth Circuit panel enforced the Board's order granting attorney's fees. The court observed that the union's violation of its duty of fair representation by its refusal to process the grievances prevented resolution of the issues by litigation or arbitration during which the aggrieved employees would have been accorded vigorous representation by a union sponsored representative. The court added that in its judgment the aggrieved employees could only be restored to that position by being unburdened of the expenses they would incur in obtaining the independent representation to which they were entitled. \textit{NLRB v. Teamsters Local 396}, 509 F.2d 1075 (9th Cir. 1975).

\textsuperscript{168} \textit{Id.} at 1232.
as the cooperative employer violates sections 8(b)(1)(A), 8(a)(1) and 8(a)(3) respectively.\textsuperscript{160}

Although it is likely that the \textit{Barton} and \textit{Pacific Maritime} decisions could have been predicated on classic 8(b)(1)(A) and 8(b)(2) formulations, the Board's reliance on the notion that unfair representation constitutes an 8(b) violation bodes well for disfavored alien employees. Perhaps the utilization of a toned down \textit{Miranda} rationale in these 1974 cases represents a metamorphosis in the Board's former inclination to completely eschew reliance on the \textit{Miranda} theory. But even if the transmutation does not radiate to other types of employment discrimination, alien employees will find clear support for a \textit{Miranda} argument in the Board's race\textsuperscript{170} and sex\textsuperscript{171} discrimination decisions. Since alienage, like race and unlike sex, has been denounced as a suspect classification,\textsuperscript{172} the Board's adaptation of the \textit{Miranda} rationale to censure sex discrimination by unions presages a similar application of \textit{Miranda} to incidents of invidious union discrimination against aliens. The \textit{Miranda} rationale, though less dynamic now than at its inception, continues to be an accessible stratagem by which to formulate a Board remedy for alien employment discrimination.

2. \textit{International Longshoremen's Association Local 1581}. The Board was presented with a novel opportunity in \textit{Longshoremen's Local 1581}\textsuperscript{173} to adopt the \textit{Miranda} rationale to remedy union employment discrimination against aliens. In early September 1965, Elias Gonzalez Guerra was transferred at Local 1581's request from the dock and commodity department to a lower paying job in the cotton compress and warehouse department. Dur-

\textsuperscript{169} Id. Member Fanning disagreed with the majority's judgment that the union had derogated the job rights of the disfavored employees for arbitrary and irrelevant reasons. Because a vast majority of workers favored the "endtailing" scheme, Member Fanning contended that the union was acting honestly, in good faith and well within the parameters of the "wide range of reasonableness" advanced by the Supreme Court in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Finding the evidence of partisan political reasons for the union's conduct to be negligible, Member Fanning concluded that the complaints should have been dismissed. 87 L.R.R.M. at 1235.

\textsuperscript{170} See, e.g., Houston Maritime Ass'n, 168 N.L.R.B. 615 (1967), enforcement denied on other grounds, 426 F.2d 584 (5th Cir. 1970); Longshoremen's Local 1367, 148 N.L.R.B. 897 (1964), enforced, 368 F.2d 1010 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967) (unions violated sections 8(b)(1)(A) and 8(b)(2) by rejecting black applicants who sought to be referred through exclusive hiring halls).


\textsuperscript{172} See Graham v. Richardson, 403 U.S. 365, 372 (1971).

\textsuperscript{173} 196 N.L.R.B. 1186 (1972), enforced, 489 F.2d 635 (5th Cir. 1974).
ing contract negotiations earlier that year the union suggested, and the employer, Manchester Terminal Corporation, agreed, that job referrals through the union's hiring hall would give preference first to United States citizens, second to Mexican nationals with families residing in the United States, and finally to Mexican nationals whose families remained in Mexico. Guerra, who was a Mexican citizen and maintained his family in Mexico, was employed by Manchester in 1960 and worked in the preferred dock and commodity department for two years before his demotion was sought by the union. Guerra was informed by Local 1581 that he would not be eligible for permanent employment in the dock and commodity facility unless he became a United States citizen or moved his family from Mexico. Local 1581's contract included a hospitalization plan for the employee and his family. The union membership had voted earlier for a proposal that required every employee in the dock and commodity department to be a person whose family was also eligible to receive benefits from the hospitalization plan. Guerra, however, was not afforded an opportunity to express his interest in the union's decision because, as an alien who had yet to declare an intention to become a United States citizen, he was ineligible for union membership.

Following his demotion, Guerra filed unfair labor practice charges with the Board. The Board issued a complaint but the trial examiner recommended that it be dismissed because Local 1581's desire to maximize benefits from its hospitalization plan justified the request for Guerra's transfer. The Board disagreed. While doubting the importance of the hospitalization plan in the union's solicitation of Guerra's transfer, the Board asserted that the union's conduct could only work to the detriment of noncitizens. The circumstances of Guerra's demotion convinced the Board that Local 1581 "discriminated against Guerra because he was a noncitizen who refused to bring his family to this country." Noting that the Supreme Court has consistently refused to acknowledge any distinction between citizens and resident aliens, the Board reasoned that Guerra's alienage and the residence of his family abroad did not constitute legitimate grounds for his demotion.

174. *Id.*

175. *Id.* The Board observed that the union, in reply to Guerra's protest of his transfer, did not mention the hospitalization plan, but instead offered to help Guerra move his family to the United States.

176. The Board cited *Hellenic Lines, Ltd. v. Rhoditius*, 398 U.S. 306, 309 n.5 (1970) (in permitting an alien seaman to recover for injuries received on a Greek ship, the Court declared that aliens are to be extended the same constitutional protections that are accorded citizens); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945). (In nullifying a deportation order filed against a labor union president based on his alleged Communist Party affiliation, the Court observed that no distinction could be made between citizens and aliens where inalienable constitutional privileges were concerned.)
out mentioning *Miranda*, the three member Board panel declared that the termination or transfer of an employee to satisfy a statutory representative encourages membership in that union and "stands as a warning to employees that the favor and goodwill of responsible union officials is to be nurtured and sustained."177 Based on this reasoning, the Board concluded that Local 1581 violated sections 8(b)(1)(A) and 8(b)(2). Additionally, the Board announced that Local 1581's creation and implementation of a job referral system in which citizens are preferred over aliens was alone sufficient to violate sections 8(b)(1)(A) and 8(b)(2).178 Since preferences were distributed only to citizens eligible for union membership instead of all employees, the Board added that the procedure undoubtedly encouraged union membership in violation of sections 8(b)(1)(A) and 8(b)(2).179

Although a union's decision to negotiate a contract provision which unreasonably discriminates against the employment status of aliens would seem to constitute unfair representation, the Board evaded any adaptation of *Miranda* to remedy the union's treatment of Guerra. The use of a duty of fair representation analysis in *Local 1581* was presumably made unnecessary by the egregious nature of the union's conduct which made suitable the diagnosis of a "pure" 8(b)(1)(A) and 8(b)(2) infraction. By creating a preferential referral system which favored United States citizens over two classifications of aliens for the higher paying dock and commodity department jobs, the union translated citizenship into a criterion for employment opportunities. Local 1581 therefore endeavored to use forbidden economic power against aliens to influence other employees to support the union in exchange for priority referral to the dock and commodity jobs from which the aliens had been excluded, as well as the higher paying jobs to which aliens with greater seniority status would have ordinarily acceded. Moreover, the union's preferential job placement scheme, which made it incumbent upon aliens to become citizens in order to eliminate both their disqualification from the dock and commodity positions and their ineligibility for union membership, violated the Board's conception of section (8)(b)(2). In the Board's judgment, Local 1581's conduct was literally union oriented in that it reinforced close association with the union and its policies.

A unanimous Fifth Circuit panel enforced the Board's decision.180 The Court's analysis was fabricated upon the Supreme Court's formulation of the elements constituting a section 8(b)(2) violation which the Court articulated

177. 196 N.L.R.B. at 1187.
178. *Id.*
179. *Id.*
180. See NLRB v. Longshoremen's Local 1581, 489 F.2d 635 (5th Cir. 1974).
in Radio Officers' Union v. NLRB.\footnote{347 U.S. 17 (1954) (specific proof of intent unnecessary for an 8(b)(2)-8(a)(3) violation where conduct of employer which has been sought by union will foreseeably result in encouraging or discouraging union membership).} According to the Radio Officers rationale, the Fifth Circuit panel observed that an 8(b)(2) violation occurs when the statutory representative engages in "impermissible discrimination" which "causes or tends to result in the encouragement or discouragement of union membership."\footnote{489 F.2d at 637.} The court agreed that there was substantial evidence to support a finding that Local 1581 impermissibly discriminated against alien employees in negotiating and enforcing a referral system which kept aliens in the lowest paying departments of the employer's operation. Perhaps the most blatant discriminatory conduct, the court noted, was the union's reliance on a classification based on alienage for job referrals. Such a classification has been identified by the Supreme Court as "inherently suspect and subject to close judicial scrutiny."\footnote{489 F.2d at 637.} Since Local 1581 had no compelling reason to legitimate the classification, the court asserted that the union's conduct was arbitrary and invidious and therefore constituted an impermissible discrimination when it caused Guerra's transfer because he was an alien.

Without acknowledging the Board's hesitance to utilize Miranda, the Fifth Circuit panel effectively superimposed the Miranda 8(b)(2)-8(a)(3) theory upon the Board's decision in Local 1581. Borrowing substantially from Judge Friendly's dissent from the Second Circuit's refusal to enforce the Board's Miranda opinion,\footnote{Graham v. Richardson, 403 U.S. 365, 372 (1971).} the Fifth Circuit described section 8(b)(2) as being concerned not only with union discrimination based on membership considerations, but also with union-induced employer discrimination on the "basis of any invidious or arbitrary classification"\footnote{NLRB v. Miranda Fuel Co., 326 F.2d 172, 180-86 (2d Cir. 1963).} such as alienage. The court then completed its Radio Officers' analysis, declaring that the statutory representative's exercise of power, to cause an employer to discriminate for such individous reasons, is likely to intimidate employees who would otherwise refrain from union membership or from engaging in any extensive union activity.\footnote{Id. at 638.}

The Fifth Circuit's application of the Miranda 8(b)(2)-8(a)(3) doctrine in Local 1581 was recently reinforced by an unprecedented ratification of that unique rationale under circumstances virtually identical to those existing in Miranda itself. In Kling v. NLRB,\footnote{509 F.2d 1075 (9th Cir. 1975).} the Ninth Circuit was confronted
with an employee's allegation that he was placed at the bottom of the seniority scale as a result of the union's arbitrary and invidious action against him because he had taken an extended leave of absence. The employee, Kaj Kling, a veteran machinist and union member, requested in writing and was granted a leave of absence by the employer, which he twice extended with the employer's permission. The employer informed the union of its decision to approve Kling's leave of absence as well as the two extensions. The union objected to the leave of absence and demanded that Kling be placed at the bottom of the seniority scale. When the employer reminded the union that the collective bargaining agreement was silent on leaves of absence, the union altered its position and contended that, although the original leave of absence may have been proper, the two extensions were improperly granted.

After returning to work and being informed that he had been placed at the foot of the seniority ladder, Kling filed an unfair labor practice charge against the union alleging that it had caused his constructive discharge through its arbitrary and discriminatory treatment of his job rights. The administrative law judge concluded that the union, in reducing Kling's seniority, had acted arbitrarily in violation of sections 8(b)(1)(A) and 8(b)(2). The Board, however, overruled the trial examiner in a terse opinion in which it held that the union's conduct was entirely reasonable under the circumstances.\(^1\)

A Ninth Circuit panel unanimously disagreed. Referring to its similar facts and "compelling argument," the court declared that *Miranda*, which had received favorable notice from the Supreme Court in *Vaca v. Sipes*,\(^2\) controlled the result in *Kling*.\(^3\) The various "flimsy reasons" with which the union attempted to buttress its decision to revoke Kling's seniority were insufficient, in the court's view, to forestall the conclusion that the union had contravened its duty of fair representation.\(^4\) Disappointingly, the court simply made a superficial application of the *Miranda* holding without endeavoring to examine its important internal components. The court neglected to document the "compelling" nature of the *Miranda* 8(b)(2)-8(a)(3) doctrine which it found so convincing and failed to provide any rationale for the doctrine's newly resurgent viability.

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188. Machinists' Lodge 68, 205 N.L.R.B. No. 26, 84 L.R.R.M. 1030 (1973). The Board reasoned that a union may legitimately seek to limit leaves of absence of an employee who while on leave retains an absolute right to return to his job and accumulates seniority, since presumably he will be allowed to bump the employee assigned to do his job while he was away and will have accumulated, during his absence, seniority and superior job rights over other employees who have been actively at work while he was out on personal business. 84 L.R.R.M. at 1032.


190. *88 L.R.R.M.* at 2385-86.

191. *See id.* at 2386.
Both the Fifth Circuit, in applying *Miranda*'s 8(b)(2)-8(a)(3) doctrine to remedy Guerra's unfavorable treatment by Local 1581, and the Ninth Circuit, in using the same rationale to recompense Kling for the damages he suffered through the arbitrary revocation of his seniority, employed a theory which had never before been approved by any federal court. Similar to the early refusal of the courts to utilize *Miranda*, the Board, shortly after positing the 8(b)(2)-8(a)(3) theory in *Miranda*, became disinclined to rely upon this component of the decision, and has only recently subscribed to its reactivation. The Board's and the courts' preliminary aversion to employing the 8(b)(2)-8(a)(3) notions of *Miranda* appears to be traceable to uncertainty regarding the kind of discrimination which these sections were intended to prohibit. The Board took the view in its *Twenty-Third Annual Report* in 1959 that discrimination in the 8(b)(2)-8(a)(3) sense results only from an arbitrary classification or discriminatory conduct against employees because they engaged in activities protected by section 7. This position was corroborated by the Supreme Court's declaration in *Radio Officers* that sections 8(b)(2) and 8(a)(3) do not prohibit all discrimination in employment, but "only such discrimination as encourages or discourages membership in a labor organization." However, in *Local 1581*, the Fifth Circuit presumed that "any" invidious or arbitrary classification constitutes the type of discrimination condemned by sections 8(b)(2) and 8(a)(3). The Board, in assuming a similar position in both *Pacific Maritime* and *Barton Brands* now contends that when a statutory representative influences an employer "to derogate the employment status of an employee for arbitrary or irrelevant reasons or upon the basis of an unfair classification," the union and employer have violated sections 8(b)(2) and 8(a)(3) respectively.

192. The Fifth Circuit approved the Board's reliance upon a breach of the duty of fair representation to establish an 8(b)(1)(A) violation in *Rubber Workers Local 12 v. NLRB*, 368 F.2d 12 (5th Cir. 1966), and *NLRB v. Longshoremen's Local 1367*, 368 F.2d 1010 (5th Cir. 1966), but declined to rule on the Board's 8(b)(2)-8(a)(3) finding. The Second Circuit refused to enforce the Board's original holding that unfair representation constituted a violation of sections 8(b)(2) and 8(a)(3) in *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963).


195. See note 134 *supra*. Discrimination related to section 7 conduct (concerted activities) constitutes a "pure" 8(b)(2)-8(a)(3) violation.

196. 347 U.S. at 43.

197. 489 F.2d at 637.

198. 87 L.R.R.M. at 1232.
The Board’s chameleon-like posture toward cases which include issues of invidious classifications as well as allegations of discrimination based upon union status does not facilitate a pragmatic analysis of the Board’s current 8(b)(2)-8(a)(3) sentiments. In Local 1581, the Board found a “pure” 8(b)(2)-8(a)(3) violation because the statutory representative relied upon the unreasonable classification of alienage to deny Guerra both employment opportunities and union membership. Nevertheless, under similar circumstances, the Board held in Pacific Maritime that the union’s refusal to refer nonmember women applicants solely because of their sex constituted unfair representation and an 8(b)(2)-8(a)(3) violation as identified by Miranda. Yet as Member Jenkins observed in his concurring opinion, Pacific Maritime could have been decided on a Miranda theory. Thus, the two 8(b)(2)-8(a)(3) theories of “discrimination” merge when the employee, while not being permitted to join the union, is unreasonably discriminated against in employment opportunities on the basis of an invidious classification contrived by the union.

The Board’s utilization of both the “pure” and the Miranda 8(b)(2)-8(a)(3) rationales, while failing to constitute a reconciliation in their opposing views of “discrimination,” will be advantageous to disfavored alien employees because the Board now has contemporary precedents upon which to structure a favorable decision under either theory. However, the more difficult question arises when the alien who is victimized by invidious union employment discrimination is a union member. Such a case is not susceptible to resolution under the tenets of the “pure” 8(b)(2)-8(a)(3) rationale because there is no distinction being made by the offending union based upon membership considerations. There remains, nevertheless, a clear breach of the duty of fair representation when a statutory representative denies employment opportunities to union employees simply because they are aliens. A situation not unlike this recently confronted the Board in Barton Brands. The statutory representative in Barton, Local 23 of the Distillery Workers, represented the employees of two distilleries which had been merged into a single operation. In “endtailing” rather than “dovetailing” the separate seniority lists of the two bargaining units, the union violated its duty of fair representation despite the fact that the persons whose employment rights suffered derogation were also union members. Thus, where union membership considerations were not at issue, the Board turned to Miranda to establish that a union’s unfair representation of its members in causing the employer to injure their employment status violates sections 8(b)(2) and 8(a)(3).

Regardless of an alien employee’s union status, therefore, discriminatory conduct perpetrated by the union, which derogates the alien’s job rights or opportunities based simply on his alienage, is an unfair labor practice. Where an invidious alienage classification is used by a statutory representative to prohibit union membership as well as to provide the basis for hiring, referring or promoting employees, an aggrieved alien may rely either upon the Board's "pure" 8(b)(2)-8(a)(3) holding in *Local 1581*, or upon the unfair representation 8(b)(2)-8(a)(3) violation delineated by the Board in *Pacific Maritime* and by the Fifth Circuit in *Local 1581*. The outcome is not reversed when the alien employee who has been victimized by discriminatory conduct because of his alienage is also a union member. *Miranda* and *Barston Brands* plainly establish that a statutory representative and an employer violate sections 8(b)(2) and 8(a)(3) respectively when the union encourages the employer to derogate the employment status of an employee irrespective of his union affiliation for arbitrary reasons, or upon an unfair classification such as alienage.

3. *Employer Unfair Labor Practices.* Most major advancements in the Board’s effort to thwart employment discrimination have related to restraining union policies which encourage job discrimination against blacks, aliens and other minority groups. Such a concentration on regulating union behavior is not surprising when one observes that the Board, by implementing the collective bargaining policies of the NLRA, inflates the power of labor unions with statutory authority until the unions attain the capacity to bargain profitably with the autonomous employer. Hence, because the Board constitutionally cannot permit a labor organization which it patronizes to use its authority to promote invidious employment discrimination, the Board has formulated several previously discussed methods to derail union employment discrimination. However, when the employer unilaterally engages in discriminatory employment practices, the Board lacks a constitutional obligation to regulate the employer’s conduct. Rather than imparting governmental authority upon employers, the NLRA has usurped portions of their traditional power. Thus, the Board cannot be held to be constitutionally responsible for the independent discriminatory acts of employers. Absent any constitutional accountability for independent employer job discrimination, Board involvement in such cases therefore must be countenanced by the statutory policies of the NLRA.\(^{200}\) The Act, however, does not exhibit a special solicitude toward remediing independent employer discrimination against aliens or other minorities. The primary authority for the Board’s interest in

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employer discrimination cases is the Act's policy of chaperoning the utilization of concerted activities by disadvantaged employees.201

Concerted activities by employees, especially when directed against discriminatory employer practices, may transpire at the direction of the union after consideration of its alternatives under the contract, or such employee conduct may be carried out by individual workers without union support. In the latter situation, the Board has generally approved the use of concerted activities by individual employees, independent of union participation, when the conduct is consistent with prevailing union objectives.202 Nevertheless, when the union has already taken measures to protest employer discrimination, the Board will refuse to protect individual employees who engage in concerted activity designed to curtail an employer's discriminatory employment practices.203 This distinction was recently accorded the imprimatur of the Supreme Court in Emporium Capwell Co. v. Western Addition Community Organization.204 The Court was confronted with the question of whether the NLRA, in light of the national labor policy against discrimination in employment, sanctions concerted activity by minority employees designed to force the employer to bargain over issues of employment discrimination.205

The minority employees in Emporium presented the union with complaints of racial discrimination in the employer's assignment and promotion practices which the union investigated and shortly thereafter agreed to process through arbitration. Several employees, however, viewed the arbitration procedures

201. See id. at 873.
202. Tanner Motor Livery, Ltd., 166 N.L.R.B. 551 (1967), vacated and remanded, 419 F.2d 216 (9th Cir. 1969). The Board assumed that the union's objectives were similar to those of the picketing employee because disagreement with their goal of eliminating discriminatory employer hiring practices would have been an unlawful breach of the union's duty of fair representation. The Ninth Circuit, however, in repudiating the Board's opinion, declared that the legitimacy of independent concerted activity by employees was contingent upon specific union authorization. 419 F.2d at 221. See also Mason & Hanger-Silas Mason Co., 179 N.L.R.B. 434 (1969).
204. 420 U.S. 50 (1975).
205. See id. at 52. The United States Court of Appeals for the District of Columbia Circuit resolved the issue by proposing a standard for distinguishing between protected and unprotected conduct. The court directed the Board to inquire whether the union in such a case was actually remeding the employment discrimination "to the fullest extent possible, by the most expedient and efficacious means." Western Addition Community Organization v. NLRB, 485 F.2d 917, 931 (D.C. Cir. 1973). The court added that when the union's efforts fail to meet the high standard, the minority employees' concerted activity remains within the protective framework of section 7. Id.
as inadequate and began picketing the store to protest the discriminatory treatment as well as to force Emporium's president to bargain with them on the issues. The company's president, while refusing to bargain directly with the dissident employees, terminated their employment following a written warning that repetition of the picketing would lead to their discharge.

In moving toward its conclusion that the disputed employee conduct was unprotected by the NLRA, the Court reexamined the exclusivity principle of section 9(a) of the Act. Central to the successful operation of the national policy of collective bargaining, the Court observed, is the principle of majority rule established by section 9(a). Despite the collective strength and bargaining power secured by majority rule, the Court noted that Congress did not authorize a "tyranny of the majority over minority interests." Rather, in enacting the NLRA Congress sought to limit the majority regime by requiring bargaining units which were appropriately structured to ensure that a commonality of interest existed among the employees. Finally, the Court added that implicit in the nature of the exclusive bargaining representative's status as representative of all employees, is the congressionally imposed duty of fair and good faith representation of minority interests which had received the Court's endorsement in Vaca v. Sipes, a violation of which had been identified as an unfair labor practice by the Board in Miranda Fuel Co. Implying that these already existing limitations on section 9(a)'s exclusive representation principle were sufficient, the Court refused to fashion an additional qualification which would permit dissident employees to bargain directly with the employer over discriminatory employment practices. The Court's rationale for this refusal was twofold. First, the concept of separate bargaining, instead of promoting the elimination of discriminatory employment practices, in the Court's view, would have the effect of compelling competition among minority groups, setting one against the other in a struggle to force the employer to meet their separate demands. Secondly, such self-destructive conduct, the Court reasoned, is not essential to the actualization of the primary national labor policy of nondiscrimination and would severely jeopardize the union's considerable interest in an orderly collective bargaining

207. 420 U.S. at 62.
208. Id. at 64.
210. See 420 U.S. at 64-65. The Court also referred to Hughes Tool Co., 147 N.L.R.B. 1573 (1964), in articulating the most explicit endorsement yet made of these controversial Board decisions.
process.\textsuperscript{211} A union, the Court declared, has a "legitimate interest in presenting a united front on [issues of employer discrimination] as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests."\textsuperscript{212} Furthermore, the Court concluded that the principle of exclusive representation which was designed to facilitate the collective bargaining process would be gravely and unnecessarily compromised if such separate bargaining were permitted.\textsuperscript{213}

The Court's \textit{Emporium} decision makes clear sense. The effort by minority group employees to carve an exception from the section 9(a) exclusive bargaining rationale for separate bargaining on issues of employer discrimination could have created an intense competition among various groups within the bargaining unit which would plainly decimate the union's "united front" and result in a deflation of the union's bargaining position vis-à-vis the employer. Under such circumstances, the pre-NLRA tactics of "divide and conquer" would be an irresistible temptation for employers. The mechanism of collective bargaining which depends upon a "clash of equals" would be dangerously undermined. Moreover, it is likely that a plethora of complicated standards governing a separate bargaining exception would be unworkable and incapable of redressing the consequent damage to the collective bargaining process.\textsuperscript{214} \textit{Emporium}, however, is not without obvious benefits to alien and other minority workers. The Court, while explicitly endorsing the duty of fair representation as a safety valve, gives \textit{Miranda} a far more straightforward ratification than any previous decision. Although aliens must combat employer discrimination under the auspices of the union, the Board will have clear Supreme Court authority upon which to rest a conclusion that a union's failure to bargain diligently to obviate an employer's discriminatory conduct against aliens not only exemplifies unfair representation but constitutes an unfair labor practice.

\textsuperscript{211} See 420 U.S. at 65-70.  
\textsuperscript{212} Id. at 70.  
\textsuperscript{213} Id. Justice Douglas dissented. Asserting that the minority employees were engaged in a traditional form of labor protest protected by section 7, Justice Douglas declared that the employees' right to nondiscriminatory treatment does not depend upon exclusive union demands but is based in law. While individual employees could reasonably be required to approach the union before resorting to concerted activity, he contended that they should not be held prisoner by an inadequate union response but should be permitted to engage in independent concerted activity. Id. at 75-76.  
\textsuperscript{214} Although the Court's opinion discusses the existence of grievance procedures as an appropriate mechanism for the resolution of employer discrimination issues, the existence of arbitration machinery does not appear to be a prerequisite to the Court's condemnation of separate bargaining by employees.
Unions which seek to fulfill their fair representation obligation to alleviate an employer's discrimination against aliens through bargaining or concerted activity will receive the support of the Board. In Packinghouse Workers v. NLRB, substantial evidence of unilateral employer discrimination against black and Latin American employees was presented. The union, through contract negotiations, sought to eliminate the abusive conditions which greatly favored "Anglo" employees. The employer remained obstinate in an attempt to dissipate the union's bargaining position by interrogating employees, promising them more advantageous employment conditions if they refrained from striking, and unilaterally granting the employees a paid holiday and a ten percent pay increase. Together with the employer's unilateral wage hike and allocation of a paid holiday, which truncated the bargaining process, the Board determined that the employer's refusal to bargain over the abolishment of discriminatory employment practices constituted a breach of the employer's duty to bargain in violation of section 8(a)(5).

The Court of Appeals for the District of Columbia Circuit not only enforced the Board's 8(a)(5) finding, it found that an employer's invidious discrimination inhibits its victims from asserting themselves against the employer to improve the terms and conditions of their employment. The court contended that employment discrimination against minority groups creates an unjustified clash of interests among groups of workers which would encourage a reduction in their ability to work together to achieve legitimate objectives. Similarly, discrimination creates an apathy or docility in its victims which interferes with the assertion of their rights against the offending employer. The court then concluded that "the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1)." The court remanded the case to the Board for hearings on whether the employer engaged in a pattern and practice of discrimination against minority groups.

However, the Board was unreceptive to the court's novel remedy for employer discrimination against minority group workers. On remand it found that the employer in Packinghouse had not engaged in a pattern and practice of discrimination.

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217. 416 F.2d at 1135.
218. See id.
219. Id. (emphasis in original). The court did not refer to any case law in reaching this conclusion but relied instead on sociological data which tended to establish the theory that illegal discrimination induces docility in the target groups which would prevent the effective assertion of the groups' section 7 rights. See 416 F.2d at 1136-38.
220. See Farmers' Cooperative Compress, 194 N.L.R.B. 85 (1971) (supplemental de-
articulated its disagreement with the *Packinghouse* rationale. Employment discrimination against minority groups standing alone, the Board declared, "is not 'inherently destructive' of employees' Section 7 rights and therefore is not violative of Section 8(a)(1) and (3) of the Act."\(^2\)\(^2\)\(^2\) Furthermore, denying that apathy or docility are the only contingent results of employer discrimination, the Board directed that there must be actual evidence of "a nexus between the alleged discriminatory conduct and the interference with, or restraint of employees in the exercise of those rights protected by the Act."\(^2\)\(^2\)\(^3\)

The Board in *Jubilee* constructed a fine but significant distinction between the existence of employment discrimination per se which the Board asserted was not proscribed by the Act, and the utilization of concerted activity to combat such discrimination, which the Board acknowledged was protected by the Act. While the *Jubilee* holding seems superficially contradictory, the Board was simply seeking to prevent the reading of an anti-discrimination clause into the Act. The Board observed that employment discrimination certainly does directly affect the terms and conditions of employment but that the NLRA itself does not act in a prophylactic manner to obviate it. Rather, it sanctions the use of concerted activity as a means of convincing the employer to eliminate his discriminatory practices.\(^2\)\(^2\)\(^4\)

III. **CONCLUSION**

*Jubilee* in conjunction with *Emporium* explicates the Board's attitude toward manners of alleviating independent employer discrimination against aliens and other minority groups. Aliens who are victimized by employer discrimination must initially act through their bargaining representative. If the union fulfills its duty to fairly represent alien employees through arbitration or negotiation with the employer regarding discriminatory practices, the

\(^2\)\(^2\)\(^2\) Because employment discrimination is not outlawed by the NLRA, the Board cannot order the employer to rectify his procedures. Even though it has the authority under section 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), to force the employer to bargain over the discrimination issue, the Board cannot require the employer to yield on this or any other issue. Section 8(d), 29 U.S.C. § 158(d) (1970), directs that neither party shall be compelled to agree to a proposal or to make a concession. This principle was confirmed by the Supreme Court in H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) (Board lacks power to order employer to accept union proposal as remedy for 8(a)(5) violation).
Board will protect the employees from deprivation of their job rights where they engage in union-sponsored concerted activity designed to bring economic pressure upon the employer. 225 If the union refuses to seek a contract or negotiated remedy to eliminate employer discrimination, alien workers may then bring an action in court or a charge with the Board alleging that the union's refusal to arbitrate or bargain for the abolishment of discriminatory employer practices constitutes unfair representation. 226

As observed earlier, the utilization of NLRA remedies is not confined to eliminating discrimination by employers. Provisions of the Act, as enforced by the Board, substantially encourage equal employment practices by both unions and employers. The Board has often utilized its options of setting aside elections, refusing enforcement of the contract bar rule, and revoking certification or refusing to certify unions which engage in discrimination against minority workers. The revival of the Board's Miranda rationale, which declared that unfair representation constitutes an unfair labor practice, bears great potential for reeducating unions which attempt to promote the interests of white native workers over those of alien employees for insubstantial reasons. Aliens who are also discriminated against by unions in the operation of exclusive hiring halls or by virtue of a merger of two previously separate bargaining units may rely on Board decisions which specifically identify such conduct as both unfair representation and an unfair labor practice. Furthermore, the decisions in Local 1581 and Kling demonstrate that the Fifth and Ninth Circuits have endorsed the Miranda rationale and will presumably, therefore, not hesitate to condemn unfair union representation of alien employees. The NLRA plainly provides the courts and the Board with comprehensive tools for remedying employment discrimination upon which aliens victimized by employment discrimination may justifiably rely.

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